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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA

C. P. POMEROY
REPORTER
RANDOLPH V. WHITING
ASSISTANT REPORTER

VOLUME 29

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DISTRICT COURTS OF APPEAL.

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JOHN E. RICHARDS, Associate Justice.

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N. P. CONREY, Presiding Justice.
W. P. JAMES, Associate Justice.
VICTOR E. SHAW, Associate Justice.

THIRD APPELLATE DISTRICT.

N. P. CHIPMAN, Presiding Justice.
ELIJAH C. HART, Associate Justice.
ALBERT G. BURNETT, Associate Justice.

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OF THE
STATE OF CALIFORNIA.

[Crim. No. 427. Second Appellate District.—November 17, 1915.]

THE PEOPLE, Respondent, v. JOSE ANDRADE,
Appellant.

CRIMINAL LAW—MURDER—FAILURE OF DEFENDANT TO TESTIFY—ERRONEOUS INSTRUCTION—ADMISSION OF KILLING BUT IN SELF-DEFENSE.
In a prosecution for murder, where the defendant did not testify in his own behalf, but stood silent under his plea of not guilty, an instruction that the defendant did not deny the killing but claimed that it was done in self-defense, is prejudicially erroneous, in the absence of direct testimony or other overwhelmingly convincing evidence connecting the defendant with the homicide, other than the alleged confession of the defendant.

1D.—EVIDENCE—POSSESSION OF MONEY BY DECEASED.—Evidence with respect to the amount of money which the deceased had on his person two days previous to the finding of his body is admissible, where it is shown by other evidence that the deceased had the possession of such money the day before the finding of his body and then exhibited it in the presence of the defendant.

1D.—CONVICTION—COMMISSION OF CRIME WITH INTENT TO COMMIT ROBBERY—INSTRUCTION PROPERLY REFUSED.—An instruction that "before you can convict the defendant of the crime charged, you must be satisfied beyond a reasonable doubt and to a moral certainty that he did commit such a crime with the intent and motive of robbery, and if you do not so find from the evidence herein, you must acquit him," is properly refused.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. J. A. Allen, Judge.

The facts are stated in the opinion of the court.

Edwards & Smith, and Ralph H. Walker, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

CONREY, P. J.—Defendant was convicted of the crime of murder and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

On the morning of January 10, 1915, the dead body of one Ina P. Cook was found on a public road in the county of Tulare, and from the evidence it clearly appears that his death had been caused by a bullet wound in the head. The evidence further shows that on the previous afternoon and evening he had been traveling along that road in an open buggy and in company with the defendant. When the deceased was last seen alive, so far as the evidence shows, he was in company with the defendant. There are no eye-witnesses to the attack which caused the death of deceased, and in that respect the defendant has been convicted entirely upon circumstantial evidence, with the single exception of an alleged confession by the defendant. The sheriff of Tulare County gave testimony concerning an interview between himself and the defendant after defendant's arrest and that in that interview the defendant admitted that he had shot Mr. Cook. The precise words covering this point, as stated by the sheriff, were that defendant "said that he did not remember whether he shot him as he was getting up or after he got up. After he shot him he ran away. He did not know where he threw the gun."

The defendant did not testify in his own behalf, but stood silent under his plea of not guilty. On this state of the record the court charged the jury as follows: "You are instructed that the defendant does not deny that he killed one Ina P. Cook on the 9th day of January, 1915, but claims that such killing was done in self-defense." The defendant claims that the giving of this instruction constitutes prejudicial error; and with this contention we are constrained to agree. "No person shall . . . be compelled, in any criminal case, to be a witness against himself. . . ." (Const.

Cal., art. I, sec. 13.) "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself. . . . His neglect or refusal to be a witness cannot in any manner prejudice him *nor be used against* him on the trial or proceeding." (Pen. Code, sec. 1323.) "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." (Const. Cal., art. VI, sec. 19.)

In giving the foregoing instruction the court usurped the functions of the jury. It withdrew from the jury the determination of the essential question whether or not the deceased came to his death at the hands of defendant and, without a verdict of the jury upon this fact, threw upon the defendant the burden of proving circumstances of mitigation or of justification or excuse. (Pen. Code, sec. 1105.) Thereby the failure of the defendant to give testimony in his own behalf was used against him at the trial, notwithstanding his plea of not guilty addressed to the entire issues of the case. In the absence of direct testimony or other overwhelmingly convincing evidence connecting the defendant with this homicide, other than the circumstances of the alleged confession, we are unable to say that the giving of such instruction was nonprejudicial error, or that the jury necessarily would have convicted the defendant if such instruction had not been given. The substantial effect of the record is that the judge set up the unsworn statement of the defendant that he did kill the deceased against the unsworn statement implied in his plea of not guilty, and made a finding of fact thereon which could lawfully be made by the jury only. (*People v. Strong*, 30 Cal. 151.)

Appellant claims that the court erred in permitting the introduction of certain testimony of the witness Jarrad with respect to the amount of money which deceased had on his person on the eighth day of January, and as to the custom of the deceased as to carrying considerable sums of money with him. The second part of this testimony, that relating to the deceased being accustomed to carry money with him, was afterward stricken out by the court, and we think the error was thereby sufficiently corrected. The testimony as to the specific sum was received upon the district attorney's assurance that knowledge of the fact would be brought home to the defendant. Other evidence was introduced showing the

possession of money by the deceased on the ninth day of January and exhibited by him in the presence of the defendant. We think that this evidence was properly received. It is true that the evidence further showed that about twenty dollars was found in the pockets of the deceased after his death, but this circumstance, so far favorable to the defendant on the question of motive, was properly subject to the consideration of the jury.

The objection that the alleged confession as detailed by the sheriff in his testimony should have been rejected because not proved to be a voluntary statement by the defendant, cannot be sustained. It was sufficiently shown and the court was authorized to determine that the statement was made freely and voluntarily and without any of those promises, threats, or other means of coercion which would require exclusion of a so-called confession. (*People v. Miller*, 135 Cal. 69, [67 Pac. 12].)

The other contentions made in the brief with respect to the reception of evidence are of minor importance and do not disclose any errors requiring discussion here, if indeed any there were.

It is further claimed that the court erred in refusing to give to the jury the following instruction: "Before you can convict the defendant of the crime charged, you must be satisfied beyond a reasonable doubt and to a moral certainty that he did commit such a crime with the intent and motive of robbery, and if you do not so find from the evidence herein, you must acquit him." The fact that the people introduced testimony for the purpose of showing the intent and motive of robbery did not have the effect to confine the charge to one of murder perpetrated in the perpetration or attempt to perpetrate robbery. The information charged that the defendant committed the crime of murder in that he "did willfully, unlawfully, feloniously and with malice aforethought, kill and murder one Ina P. Cook, a human being," etc. The particular motive above mentioned was not necessary to a successful prosecution in this case. Any kind of willful and premeditated killing would be sufficient to constitute the crime. (Pen. Code, sec. 189.)

The judgment and the order denying defendant's motion for a new trial are reversed.

James, J., and Shaw, J., concurred.

[Civ. No. 1767. Second Appellate District.—November 17, 1915.]

B. K. STROUD, Appellant, v. H. W. FAIRBANKS,
Respondent.

PARTNERSHIP—PURCHASE AND SALE OF OIL LANDS—NATURE OF TRANSACTION—CONFLICT OF EVIDENCE—FINDINGS CONCLUSIVE.—In this action to recover profits alleged to have accrued on account of a joint enterprise entered into between appellant and respondent with respect to the purchase and sale of certain oil-producing lands, it is held that the record presents a state of conflicting evidence as to the nature of the agreement between the parties upon which the findings against the claim of appellant of a partnership are conclusive.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. John G. Covert, Judge presiding.

The facts are stated in the opinion of the court.

E. L. Foster, and Frank H. Short, for Appellant.

George E. Whitaker, and Kemp, Mitchell & Silberberg, for Respondent.

JAMES, J.—This case is brought into this court on an appeal taken by the plaintiff from an adverse judgment and also from an order denying his motion for a new trial.

Appellant brought this action to recover profits alleged to have accrued on account of a joint enterprise entered into between himself and the respondent with respect to the purchase and sale of certain oil-producing lands in the county of Kern. We are asked only to consider one point, to wit: As to whether the evidence sustains the findings made by the trial judge. A careful examination of the testimony as it is set out in the bill of exceptions leads us to the conclusion that as to the main issues in controversy there was testimony before the court from which the conclusions of fact as set forth in the findings might naturally and legally follow. From this testimony it appears that in the year 1908 appellant was employed by the Fairbanks Oil Company, which was operating in Kern County, as superintendent of its field



plant; that respondent was connected with that corporation; that upon the occasion of a visit made by respondent to the oil fields respondent and appellant made a short trip for the purpose of viewing certain undeveloped land lying in that neighborhood of which a certain section 14 was a part; that as to the north half of this section 14 some conversation took place between the two; that this ground was held by several individuals under placer locations; that appellant and respondent had some talk with one McReynolds, who represented himself and other of the locators on section 14. Following this a contract was made by respondent and McReynolds which provided for the acquiring by respondent of a certain interest in the north half of section 14 upon consideration that Fairbanks should develop the property within a certain period of time in that contract mentioned. The terms of this agreement were not complied with on the part of respondent, and shortly after default had been made of some of the conditions therein set forth, respondent and associates other than appellant entered into a contract with McReynolds and others whereby a large body of land, including several sections and including the north half of section 14, which was the subject of the first contract, was provided to be taken over by respondent and his associates and developed. Later the contract rights so acquired were negotiated to other interests and respondent received a considerable sum of money in exchange for his interest. It was the claim of appellant that respondent and he held a partnership interest as to the rights acquired by the first contract affecting the north half of section 14, and that when the sale was made of the total interests involved in the second contract some accounting should have been made to him for his interest in the first contract. Respondent denied positively that there was any partnership interest agreed to be given to the appellant under the first agreement; his statement as shown in his testimony was that the understanding expressed between himself and appellant was that if a corporation could be organized to handle the placer rights on the north half of section 14, and if the appellant would assist in the forming thereof, that he (respondent) would see that appellant was given employment as superintendent of the proposed company and receive some shares of stock therein as additional compensation. So it first appears that there was a conflict in the

testimony as to what the agreement between the parties really amounted to. The further fact appears without dispute that appellant did nothing at all in the direction of assisting in the organization of a company to promote and develop the north half of section 14. It is also clear that the rights of respondent in the first contract made with McReynolds had become subject to forfeiture at the time the second contract was made which included many times the acreage of ground described in the first contract. McReynolds testified as to the termination of the first contract as follows: "After the contract was signed Dr. Fairbanks arranged for some material and, as I recollect it, arranged to have it hauled to the ground, and about the 15th of December advised me that he was unable to go ahead with the contract; unable to fulfill its terms. Nothing was done after that; no other development or work was done under the conditions and terms of that contract. Dr. Fairbanks and I agreed that the contract was at an end. This contract of November 30th was not performed." Appellant admits that there was testimony in contradiction of his own as to the principal circumstances relied upon as tending to establish his case. He claims, however, that certain letters written by respondent constitute admissions conclusive in their nature against the respondent and which statements were not refuted. In view of the testimony introduced on behalf of the respondent and denial of the principal occurrences as testified to by appellant, we do not think that the letters constitute admissions conclusive in their nature as to appellant being possessed of any legal claim for the compensation asserted by his complaint. Without reciting in detail the contents of these letters, it is enough to say that such contents may properly be resolved in accordance with the oral testimony of the respondent and against the contention of appellant. In one of the letters respondent refers to arranging to give the appellant something on account of that first contract, but expresses it as being such "an amount which might be held as morally due you for your interest." Resolving the case briefly, the record presents a state of conflicting evidence upon which the findings of fact as made by the trial court cannot be questioned on appeal.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1848. Second Appellate District.—November 17, 1915.]

**AMERICAN EXCHANGE NATIONAL BANK OF
DULUTH (a Corporation), Petitioner, v. SUPERIOR
COURT OF THE COUNTY OF LOS ANGELES,
JOHN W. SHENK, Judge, Respondents.**

ACTION UPON CHECK—GARNISHMENT OF DEFENDANT IN ANOTHER ACTION—ERRONEOUS STAY OF PROCEEDINGS.—An order staying proceedings in an action brought by the assignee of a dishonored check against the maker thereof until another action pending in the same court against the payee of the check was finally determined, is erroneous, where such order was based upon a notice of garnishment in the latter action served upon the defendant in the former action, which did not in any way pretend to describe or identify such check, but only gave notice of attachment of all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendant in the latter action in the possession or under the control of the defendant in the former action.

ID.—GARNISHMENT OF DRAWEE IN DIFFERENT ACTION—STAY OF PROCEEDINGS UNWARRANTED.—Such an order cannot be supported for the reason that it is shown by the answer that another attachment in a different case against such payee was issued and garnishment notice therein served on the defendant herein and also on the drawee of the check, and that the refusal of the latter to honor and pay the check was solely on account of such notice of garnishment.

ID.—GARNISHMENT OF CHECK AFTER DELIVERY.—By agreement a check may be taken as absolute payment, and the drawer will then be liable only as an indorser, and not on the original debt; and a check is always so far payment until dishonored that, after its delivery, the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check is given.

ID.—LIMITATION OF GARNISHEE'S LIABILITY.—A garnishee's liability in the case of a debt due from him is grounded upon and is limited by his liability to the defendant in the principal action whereby the latter has at the time of the garnishment a cause of action, present or future, against him.

APPLICATION for a Writ of Mandate originally made in the District Court of Appeal for the Second Appellate District directed to the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Davis, Kemp & Post, for Petitioner.

C. H. Brock, and M. P. Frasier, for Respondents.

CONREY, P. J.—On petition for writ of mandate. An action numbered B-16,352 and entitled American Exchange National Bank of Duluth, Plaintiff, *v.* Title Insurance & Trust Company, Defendant, was filed in the superior court of Los Angeles County on September 11, 1914, and is now pending. In that action the plaintiff seeks to recover a sum of money due upon a check assigned to it by one J. H. Constantine. This check was issued by the Title Insurance & Trust Company to Constantine on May 12, 1914, and was thereafter indorsed and transferred by Constantine to the plaintiff. The action was brought against the defendant company after presentation of the check by the plaintiff to the bank against which it was drawn and refusal of payment by that bank. The action of plaintiff against the Title Insurance & Trust Company came on regularly for trial on June 3, 1915, counsel for the respective parties being present in court. Thereupon the defendant moved the court for a stay of proceedings in the action until final determination of another action pending in that court, numbered B-25,383 and entitled Herbert Freston, Plaintiff, *v.* J. H. Constantine, Defendant. An order was made granting said motion and in accordance therewith the superior court refused to proceed with the trial of the case. The petitioner alleges that by reason of said order and action on the part of the respondent, petitioner is unable to proceed with its said action and unless relief be granted in this proceeding the action cannot be tried until final judgment shall have been rendered in the Freston case.

The motion of the defendant Title Insurance & Trust Company for stay of proceedings in the action against it was made "on the grounds that the defendant in this action has been served with notice of garnishment in said case of Herbert Freston, plaintiff, against J. H. Constantine, defendant, as aforesaid, as will more fully appear by the affidavit marked 'Exhibit A' attached hereto and made a part hereof." The affidavit shows that the action of Freston *v.* Constantine was commenced on June 2, 1915; that a writ of attachment was issued in that action against the property of the defendant Constantine; that the writ, with notice of garnishment of

the funds and property of Constantine and of any indebtedness due to Constantine from the Title Insurance & Trust Company, was served on the company on June 2, 1915; and that the Freston action is still pending. The affidavit, which is by the secretary of defendant company, closes by saying, "that it was sought by said writ of attachment and notice of garnishment to attach all indebtedness, if any, of the defendant, Title Insurance and Trust Company, to J. H. Constantine, under and by virtue of the identical check sued upon in this action." The notice of garnishment as served by the sheriff upon the defendant company is attached to the answer of respondent herein and does not in any way pretend to describe or identify said check. It purports only to give notice of attachment of all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to defendant Constantine in the possession or under the control of the Title Insurance & Trust Company. If the obligation sued upon by the plaintiff in action No. B-16,352 is not a debt owing by the defendant company to Constantine, the garnishment proceeding can furnish no reason for postponing the plaintiff bank in the enforcement of its demand. The subject matter of the complaint in the Freston case has no relation whatever to the check sued on in action No. B-16,352. A judgment in favor of plaintiff bank in its action against the Title Insurance & Trust Company cannot possibly be rendered, except upon a finding that the plaintiff bank is the legal owner of the obligation, to wit, the check indorsed to it by Constantine. If it is such legal owner, we can find no reason or rule of law under which it should be compelled to postpone realization upon its demand until the settlement of a controversy between its assignor and some one claiming to be his creditor.

It is claimed by respondent that progress in the action against the Title Insurance & Trust Company should be stayed for the further reason that, as shown by the answer in that action, another attachment in the case of one Lovell against J. H. Constantine (No. B-12,286 of said superior court) was issued and garnishment notice therein served on the Title Insurance & Trust Company and also on the Farmers & Merchants' National Bank, drawee of the check so assigned by Constantine to the petitioner herein, plaintiff in action No. B-16,352; that the refusal of the bank to honor

and pay the check was solely on account of said notice of garnishment served on it. This matter is probably extraneous to the case presented for our decision, since the motion for stay of proceedings in action No. B-16,352 referred only to the attachment proceedings in the Freston case. But even conceding that the garnishment in the Lovell case is a proper subject for consideration here, we do not think that the respondent is in any better position on that account. We apprehend that the reason given by the Farmers & Merchants' National Bank for not honoring the check and the notice of garnishment served upon that bank are not available to the defendant Title Insurance & Trust Company as a ground for abatement of proceedings in the action against it. So far as the notice of garnishment is concerned in the action of Lovell against Constantine, it is of no more importance with respect to the matters involved herein than is the garnishment notice in the Freston case. "By agreement a check may be taken as absolute payment, and the drawer will then be liable only as an indorser, and not on the original debt. And a check is always so far payment until dishonored, that, after its delivery, the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check is given." (Morse on Banks and Banking, 4th ed., sec. 543.) "A check given by a debtor in settlement of an account is so far payment as to discharge the drawer as trustee of the payee, service being made on him after giving the check but before presentment; the check is payment unless dishonored." (Id., sec. 545; *Getchell v. Chase*, 124 Mass. 366.) A garnishee's liability in the case of a debt due from him is grounded upon and is limited by his liability to the defendant in the principal action whereby the latter has at the time of the garnishment a cause of action, present or future, against him. (Drake on Attachment, 7th ed., sec. 463.) But Constantine had no right of action against the Title Insurance & Trust Company, for its check issued in his favor, either in payment or in conditional payment of its obligation to him, was not dishonored while in his hands.

Being of the opinion that the notices of garnishment relied upon by the respondent herein were not sufficient to impose upon the Title Insurance & Trust Company any liability affecting the check issued by it to Constantine, we think that the court erred in granting the motion for stay of proceed-

ings in said action No. B-16,352, and that the plaintiff therein is entitled to have the case proceed to trial and judgment the same as if neither of said garnishments had been issued. Let peremptory writ issue.

James, J., and Shaw, J., concurred.

[Crim. No. 816. Third Appellate District.—November 18, 1915.]

THE PEOPLE, Respondent, v. W. P. SIDWELL, Appellant.

CRIMINAL LAW—INVOLUNTARY MANSLAUGHTER—DEATH FROM GROSS NEGLIGENCE—DEGREE OF TURPITUDE.—While involuntary manslaughter may be committed in two different ways, the legislature has not recognized, as between those ways, any distinction in the degree of turpitude characterizing that crime; in other words, the crime is that of involuntary manslaughter whether the killing be committed in the execution of an unlawful act, etc., or in the execution of a lawful act, etc., or where death, not willfully or intentionally produced, is, nevertheless, caused by the gross or culpable negligence of the defendant—negligence which, in degree, goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence, for which the party guilty of it may be held criminally liable.

ID.—NEGLECT OF SPECIAL OFFICER—BREAKING INTO ROOM WITH LOADED PISTOL IN HAND—DISCHARGE FROM UNKNOWN CAUSE—VERDICT OF MANSLAUGHTER.—In the prosecution of a deputy sheriff and special police officer for the crime of murder, it cannot be said, as a matter of law, that the jury were not justified in returning a verdict of involuntary manslaughter, where the evidence shows that the crime was committed by the discharge of a loaded revolver through some unknown cause, while in the hand of the defendant and while he was engaged in forcibly effecting an entrance into a room where gambling was going on, and where there was gathered a number of persons sitting about a table in close proximity to the door broken open by the defendant, and it appearing that he was aware of their presence therein.

ID.—VERDICT OF INVOLUNTARY MANSLAUGHTER—GROSS NEGLIGENCE OF DEFENDANT—REJECTION OF EVIDENCE—REFUSAL OF INSTRUCTIONS—LACK OF PREJUDICE.—Where in a prosecution for murder one of the issues involved in the charge was whether, in the handling of the weapon, at the time of the fatal shooting, the defendant was culpably negligent, and if so, whether such negligence was the cause of the death of the deceased, and the jury returned a verdict of



involuntary manslaughter, which crime involves no element of instant, but proceeds solely from a degree of negligence which makes the act of killing unlawful, the defendant was not prejudiced by alleged erroneous rulings in the exclusion of evidence and in the disallowance of instructions justifying his conduct in breaking into the room of the deceased, and his right to carry such weapon in his hand at the time of the breaking.

ID.—NEW TRIAL—MISCONDUCT OF JURY—AFFIDAVITS OF JURORS—MISTAKEN OPINION AS TO NATURE OF CRIME.—A motion for a new trial upon the ground of the misconduct of the jury is properly denied where the same is based upon affidavits of two of the jurors, in which they alleged that they were at all times during the deliberations of the jury of the opinion that the defendant was entitled to an acquittal at their hands, and so voted up to the time that they were led to believe that the crime of involuntary manslaughter was not a felony under the laws of the state of California, and that had they known or believed that it was a felony, they never would have agreed to a verdict of guilty of such crime.

APPEAL from a judgment of the Superior Court of Lassen County, and from an order denying a new trial. H. D. Burroughs, Judge.

The facts are stated in the opinion of the court.

Pardee & Pardee, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was charged, by information duly filed in the superior court of Lassen County, with the crime of murder, and, upon his trial on said charge, was convicted of the crime of involuntary manslaughter and thereafter sentenced by the court to serve a period of one year in the state penitentiary.

He appeals from the judgment of conviction and the order denying his motion for a new trial.

The homicide occurred at the town of Westwood, in said county of Lassen, on the fourteenth day of March, 1915.

It appears to be conceded, although we have been unable to find the facts to have been shown by the evidence, that the town of Westwood has been brought into existence within the last three years by the Red River Lumber Company, a corporation, maintaining an extensive lumber manufacturing

plant there; that said company owns all the real estate within said town or upon which it stands, and that the town has a population of approximately two thousand five hundred, all of whom are employees, or members of the families of employees, of said company.

It appears from the record that the company maintains a number of boarding, lodging and bunk houses, in which many of its employees are housed and boarded, and also a number of private residences for use by employees having families. One of the places so established and maintained by the company is the "Hotel Seville," in which a number of employees, principally those of the Spanish and Mexican races, occupied apartments.

It seems that the company, from the beginning of the time at which it established its enterprise at Westwood, laudably attempted to maintain the town as a peaceful and law-abiding community and to encourage and promote habits of sobriety and industry among its employees, and to that end adopted and promulgated a rule prohibiting gambling and the use of intoxicating liquors within the town limits among and by such employees. To enforce said rule, it was, quite naturally, deemed essential to police the town, and to some extent this was done, and thus a necessary and reasonable surveillance over the employees maintained.

The defendant had been commissioned by the company to discharge the duties of a special police officer, and, to vest him with authority to make arrests and otherwise enforce the law and the rules and regulations of the company within the limits of the town of Westwood, he was appointed a deputy sheriff by the sheriff of Lassen County. He had been given instructions by the officers of the lumber company to report to them any gambling among the employees of the company within the town which he might discover, and, furthermore, was instructed that, in the event he had reason to believe that gambling was being carried on in any room of any of the lodging and bunk houses, to break open the door of such room, if necessary, so that he might be able to identify and report to the company the names of the employees thus engaged in violating the rule against that practice.

The immediate facts and circumstances of the shooting are correctly told in the brief of counsel for the defendant as follows:

"About midnight, between the 13th and 14th of March, 1915, defendant, being on duty, took with him one Robert Weber, who was in the employ of the company and acting as night watch at the time, and started out to see if any of the men were gambling in any of the company's lodging or bunk houses. At about half an hour after midnight, in the morning of March 14th, they came to a lodging-house known as the Hotel Seville, and seeing from the outside that there was light in one of the rooms on the first floor of the building, they went inside, and by listening at the door of room No. 8, they heard what they believed to be the noise of gambling from within, and, finding the door locked, defendant determined to break it open. With this in view, according to his statement, he took his pistol—a Colt army special, double action revolver of 38-caliber—from his hip pocket and placed it in his left hand, so that he might take the door knob in his right hand and put his right shoulder against the door. The gun was not cocked—of this he is very positive—but the very instant the door was broken open the gun was discharged. This is shown by the evidence of five witnesses for the prosecution who were in the room at the time.

"By the evidence of the prosecution it is shown that there were, at the time, in the room, nine persons, all of them being Spaniards. They were sitting around a table, gambling. One sat in a chair behind the table facing the door; three sat on a bed on the left-hand side of the room and two on a chair, which was turned down, between the table and the door, so that the one man could sit on the legs of the chair, and the other on the back of the chair—the top of the chair back resting on the bed, which was on the right-hand side of the room as you go in.

"The man sitting on the legs of the chair, with his back to the door, was Francisco Escrivano, the one who was killed. The evidence shows that he was shot through the body—the bullet having entered a few inches above the crest of the hip and about half an inch to the left of the spine; the point of exit being about one and one-half inches above the navel and half an inch to the left of the middle line of the front of the body; the bullet having taken a horizontal course through the body, perforating the stomach and the bowels in several places.

"Defendant testified that he first thought, when he heard the discharge of the gun, that someone in the room had shot him, but he soon realized that he was not hit and that Escrivano was wounded. In any case, it is clear from the evidence that Escrivano immediately made an outcry in Spanish, and got up and moved about in such a way as to lead the witnesses to think at first that he was wounded in his leg. Almost immediately upon discovering that the man was wounded, and believing the wound to be in the leg, and therefore not necessarily serious, Sidwell gave his gun to Weber, told him to keep all the men in the room, and ran upstairs in the building to the clerk's room, where there was a telephone, and called up a nurse at the hospital, to have the doctor come at once to the Seville, that a man was shot in the leg. He then went back downstairs, by which time the man's friends had opened his clothing and discovered that he was shot through the body. When the defendant returned to the room and found this state of facts and found the man on, or partly on, his feet, he told the men to lay him on one of the beds; that he was too badly hurt to be allowed to stand up and walk around; and then immediately ran upstairs again and called up the stable to have a conveyance sent at once, to use as an ambulance, to take the man to the hospital. After coming downstairs the second time Sidwell became impatient because the doctor did not arrive promptly and, after a few minutes, started to the hospital to see what was delaying him. He met the doctor near the hospital and returned with him to the Seville. Escrivano was placed in a wagon—on a cot—but, the road being rough and causing him much pain, the cot was taken from the wagon and he was carried to the hospital by hand, the defendant assisting him. The doctor gave such attention to the case as was possible, but Escrivano died about 8 o'clock on Monday evening, March 15th."

The above embraces a synoptical statement of all the facts brought to the attention of the jury.

The defendant complains: 1. That the evidence is insufficient to support the verdict; 2. That the court erred to his prejudice by its rulings excluding certain testimony; 3. That it likewise erred in its refusal to adopt and read to the jury certain instructions proposed by him; 4. That prejudicial error was committed in the order denying him a new trial on

the ground of the alleged misconduct of the jury, whereby a fair and due consideration of the case was prevented.

While it instructed the jury that the Red River Lumber Company, being the owner of the Hotel Seville, had the right to make a rule that no gambling would be permitted in any room or part of said hotel, and the further right to "direct and instruct the defendant to use all lawful means for the purpose of detecting persons engaged in gambling" in any of the rooms of said hotel, the court refused to instruct, as requested by the defendant, that the said company had the right to direct and authorize the accused to break into such rooms or houses, if necessary, for the purpose of ascertaining whether the rule of the company against gambling was being violated, and that the defendant, when breaking into the room of the deceased on the occasion of the shooting, "was actually within his legal rights." To the contrary, the court told the jury that the breaking into the room of the deceased by the defendant "was a wrong."

The court refused to permit the defendant to show that the penalty of violating the rule against gambling would be the discharge of those found engaged therein from the employment of the company, and, furthermore, disallowed testimony offered by the defense which would have shown or tended to show that the employees of the company expressed dissatisfaction with the company's inhibition against gambling, and that certain of them, not named and perhaps not individually known, had threatened to resist by violent means any attempt of the defendant or any special officer of the company to enter their rooms for the purpose of detecting them in the act of violating said rule.

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, sec. 192.)

Thus it will be observed that, while involuntary manslaughter may be committed in two different ways, the legislature has not recognized, as between those two ways, any distinction in the degree of turpitude characterizing that crime. In other words, the crime is that of involuntary manslaughter,

whether the killing be committed in the execution of an unlawful act, etc., or in the execution of a lawful act, etc., or where death, not willfully or intentionally produced, is, nevertheless, caused by the gross or culpable negligence of the defendant—negligence which, in degree, goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable.

Now, conceding that the court erred in instructing the jury that the defendant committed a wrong by breaking open the door of the room in which the deceased and others were supposed to be gambling, or, in other words, that the defendant had no legal right to break into a room or house of the company for the purpose of apprehending its employees in the act of violating the rule against gambling; conceding, further, that the court should have allowed the defendant to prove that the employees were dissatisfied with said rule and had threatened to do violent injury to the defendant or any other employee who might undertake to detect them in the act of gambling in the houses or rooms of the company, and, further, assuming that the court erred in not permitting the defendant to show what would be the result to the employees if found in the act of gambling contrary to said rule; conceding, furthermore, what is true as a legal proposition, that the defendant had the right to carry a deadly weapon upon his person and the right, in view of the threats above referred to and which had previously been communicated to him, to carry such weapon in his hand at the time he attempted to ascertain whether gambling was going on in the room in which the fatal shooting occurred—conceding, we say, the legal integrity of all the foregoing propositions, still one of the issues involved in the charge against the defendant was whether, in the handling of the weapon, *at the time of the fatal shooting*, he was culpably negligent, and, if so, whether such negligence was the cause of the death of the deceased, and, in view of the conclusion of the jury that the accused was guilty of involuntary manslaughter, which crime involves no element of intent, but proceeds solely from a degree of negligence which makes the act of killing unlawful, it cannot be conceived or justly be declared that he suffered any prejudice by reason of the alleged errors complained of; for, by the verdict, he was given the full benefit of whatever force there might have been

in the excluded testimony and the instructions proposed by him but disallowed by the court. Whether the killing was the result of "the commission of an unlawful act, not amounting to a felony," or occurred "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection," the defendant could obviously have been convicted of no less a crime than that of which he was found guilty, even if the testimony and the instructions whose disallowance by the court constitutes the ground of the objections under consideration had been admitted and given. In other words, it being true, as the code section declares, that involuntary manslaughter may be committed while the party responsible for the killing is doing a lawful act, and, assuming that the rejected testimony and instructions would have conveyed to the jury certain facts and principles of law in all respects sound and pertinent to the charge as laid in the information, yet, if the evidence was sufficient to convince the jury that the discharge of the weapon was directly due to the gross or culpable negligence of the defendant in the handling of the weapon at the time of its discharge, and that such negligence was the cause of the death of Escrivano, then, since he was found guilty of the lowest crime of which he could be convicted under the information, the rulings excluding the proffered testimony and disallowing the proposed instructions could not have had a harmful or prejudicial effect upon the substantial rights of the accused.

As we conceive it, the principle thus applied is the same as where an erroneous instruction peculiarly applicable to a charge of murder of the first degree has been given and the verdict is one of guilty of murder of the second degree or of manslaughter. Repeatedly it has been held that in such case, even though the instruction might be prejudicially erroneous where the verdict was of the first degree, a verdict of guilty of the lesser degree of murder or of manslaughter would render the instruction innocuous in its effect upon the rights of the accused.

We now come to a consideration of the proposition, urged with much vigor by the defendant, that the jury were not justified by the evidence in finding him guilty of any crime or degree thereof embraced within the crime charged.

The question, however, with respect to the evidence which this court is alone authorized to determine is whether we can

say, from the record, as a matter of law, that the jury were not justified in finding the verdict they returned; and it may just as well here be stated that, after a careful review of the whole record, we are constrained to the conclusion that we would not be justified in so declaring. In other words, the evidence as it is brought before us is such that whether the defendant was culpably negligent in the handling of the weapon at the time the fatal shot was discharged therefrom and, if so, whether such negligence was the cause of the death of Escrivano, are questions which it was for the jury to determine, and not within the legal competence of this court to review.

The general facts of this most unfortunate affair are given above. But precisely how or in what manner the pistol was discharged, the evidence does not disclose, nor, indeed, under the circumstances, is it to be supposed that anyone would know, unless it was the defendant himself. He, however, declared that he could not, except by mere conjecture, explain the direct cause of the discharge of the weapon, although the theory advanced by the defense is that he must have had his finger upon the trigger of the weapon when he was in the act of forcing the door open and have unconsciously pulled the trigger as the door gave way under the force he put upon it.

The weapon, according to the evidence and the testimony of the defendant himself, was what is known as a "self-cocker," and operates automatically—that is, it is one of those revolvers that are discharged by means of pressure upon or the pulling of the trigger. As seen, at the time the defendant attempted to and did shove the door in he held the weapon uncocked in his left hand, using his right hand and shoulder to break open the door. The instant the door gave in from the force applied to it by the defendant, the weapon exploded. In other words, the giving way of the door and the discharge of the pistol were approximately simultaneous. The only plausible explanation of the cause of the discharge is that either the trigger came in contact with some part of the door when it was forced open in such manner as to throw the lock back or, as the defense suggest, the defendant had his finger upon the trigger at the moment he exerted the force necessary to shove the door in and at the same instant of time involuntarily pulled the trigger—a movement which could be influenced or caused by the exertion employed in breaking open the door by means of the force required to be exerted for that purpose. This latter

theory is the more plausible of the two and, as seen, coincides with the view of the defendant as to the cause of the discharge of the weapon. It, however, only emphasizes the fact of the recklessness in handling a loaded firearm near the presence of others when the party handling it is at the same time attempting some other act which must necessarily distract his attention from the weapon. But whatever might have been the direct cause of the discharge of the weapon, the fact remains that it was discharged through some cause while in the hand of the defendant, and while he was engaged in forcibly effecting an entrance into a room where there was gathered a number of persons sitting about a table in close proximity to the door broken open by him and of whose presence there he was aware.

The handling of a loaded firearm in a public street or in a building or other place where a number of people are assembled or are passing to and fro is always attended with more or less danger, even where some degree of care is exercised in the handling of such weapon; but how much more danger must there be in the handling of such weapon by a person at a time when his mind is occupied by another matter of paramount concern to him. His mind could not at that time be upon the weapon to such a degree as to enable him to handle it with the care and caution with which ordinarily he would probably handle it. That the defendant's mind was not upon his weapon as he was forcing the door open, is very clear from the fact that he did not know precisely how it came to be discharged. It would seem to be true that the act of the defendant in holding in his hand a loaded weapon at the time he was engaged in forcing an entrance into the room, thus bringing into play much, if not all, of his physical power, and with his mind centered upon getting into the room, itself constituted gross or culpable negligence. At all events, the jury could reasonably have so viewed that act, and their verdict implies that they did thus view it, and, as before stated, we are unprepared to say, as a matter of law, that they reached an erroneous conclusion or that the result of their consideration of the evidence is not justified.

The next and last point to be considered involves the question of the alleged misconduct of the jury.

It appears that after the case had been submitted to the jury and the latter had retired to the jury-room for deliberation and had thus been out for some time, they caused to be

conveyed to the judge information that they desired further instruction as to the amount of punishment to which the defendant would be amenable in the event of the return of a certain verdict. The court thereupon ordered the jury to be brought before it and, this being done, the foreman, after stating that they had not agreed upon a verdict, remarked: "The jury would like to ascertain the degree of punishment that would follow conviction of either one of the degrees of murder charged in the complaint." To which the court replied that, except as to the crime of murder of the first degree, the matter of punishment was wholly a province of the court, and, consequently, one with which the jury had no concern, and declined to give them any information upon the subject. The jury were thereupon returned to the jury-room for further consideration of the case.

In support of his motion for a new trial upon the ground of the asserted "misconduct of the jury by which a fair and due consideration of the case has been prevented" (Pen. Code, sec. 1181, subd. 3), the defendant filed and introduced affidavits by two of the jurymen in which they alleged that they were at all times during the deliberations of the jury of the opinion that the defendant was entitled to an acquittal at their hands, and so voted up to the time that they were led to believe that the crime of involuntary manslaughter "was and is not a felony under the laws of the state of California; and affiants further say that to the best of their knowledge and recollection each and every member of said jury, while deliberating upon said case, expressed himself as believing that the crime of involuntary manslaughter is and was not a felony under the laws of the state of California"; that had they known or believed that the crime of involuntary manslaughter was a felony under the laws of the state of California, they "never would have consented or agreed to a verdict of guilty of such crime in said action."

The reply to the contention that the showing thus made entitled the defendant to a new trial is that the affidavits of jurors cannot be received or considered for the purpose of impeaching their verdict. (*People v. Azoff*, 105 Cal. 632, [39 Pac. 59]; *People v. Soap*, 127 Cal. 408, 411, [59 Pac. 771]; *People v. Emmons*, 7 Cal. App. 685, [95 Pac. 1032].) In the Soap case, *supra*, the ground of the alleged misconduct of the jury was precisely the same as that upon which the defendant

in the case at bar based his affidavits alleging misconduct. The court in that case said: "It has been definitely settled that the affidavit of a juror cannot be received to impeach the verdict except where it is the result of a resort to the determination of chance."

We have now considered and disposed of all the points urged for a reversal.

The judgment and the order appealed from are affirmed.

Chipman, P. J., concurred.

BURNETT, J., Concurring.—I concur in the judgment and the foregoing opinion, but I desire to add that, in my judgment, if the defendant had shown the facts that he sought in vain to introduce in evidence, it would have afforded no justification nor excuse for his conduct in needlessly imperiling the lives of the men in the room. The mere circumstance that gambling was being carried on was not sufficient, as I view it, to warrant the defendant in breaking down the door, with a loaded pistol in his hand. Especially would this be true when he had reason to believe that a fatal affray might ensue. His desire and that of the company to suppress gambling was, of course, commendable, but the method resorted to was too drastic. Human life is too precious to be jeopardized for the purpose of ascertaining whether parties are engaged in a peaceful game of poker. Defendant should have directed the inmates to open the door before resorting to such violence, and I think he should have gone away rather than plunge into the room with his loaded revolver in his hand. Our aversion to vice should not blind us to the more vital consideration of life itself.

[Civ. No. 1730. Second Appellate District.—November 20, 1915.]

Mrs. P. T. ANDERSON, Respondent, v. WALTER A. LEWIS, Auditor of the County of Los Angeles, Appellant.

PROBATION OFFICERS—POWER OF APPOINTMENT—COUNTY CHARTER.—

Where a county charter adopted pursuant to the amendment of 1911 to section 7½ of article XI of the constitution authorizes the board of supervisors of the county to make provision for the appointment of probation officers, and provision is so made, the general laws of the state are superseded.

Id.—ORDINANCE CREATING PROBATION OFFICES—SILENCE AS TO MANNER

OF APPOINTMENT—GENERAL LAW APPLICABLE.—Where, however, the board of supervisors, in enacting an ordinance providing for probation officers and fixing the compensation of the officers, makes no mention of the manner in which the appointments shall be made, the general laws of the state govern the matter.

Id.—ASSISTANT PROBATION OFFICER—INVALID APPOINTMENT.—An as-

sistant county probation officer appointed by the judge of the juvenile court instead of by the chief probation officer of the county is not a legally appointed officer, where such county had adopted a free-holders' charter and provided therein that its board of supervisors might make provision for the appointment of such officers, notwithstanding that such board, in enacting an ordinance providing for such officers, failed to make any mention of the manner of their appointment.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge.

The facts are stated in the opinion of the court.

A. J. Hill, County Counsel, and Roy V. Reppy, Assistant County Counsel, for Appellant.

Ford & Hammon, and Tyrrell, Abrahams & Brown, for Respondent.

JAMES, J.—Respondent herein petitioned the superior court to issue a writ of mandate compelling appellant, as the auditor of the county of Los Angeles, to issue to her a warrant on the county treasurer for the sum of one hundred dollars as salary to which she claimed to be entitled. It was alleged

that during the month of December, 1914, respondent occupied the position of assistant probation officer of the county of Los Angeles. The writ was issued and the auditor appealed.

It is urged that the judgment was unwarranted because of the insufficiency of the evidence as to several material matters embraced within the findings of the court. The trial judge, in brief, determined the facts to be that: Petitioner, on the twelfth day of December, 1913, was on the civil service list as an eligible for appointment as assistant probation officer, and that on or about said twelfth day of December, 1913, she was nominated and appointed to the position by the chief probation officer and assigned to duty, and that she entered upon her duties as such officer, and ever since that time, to and including the month of December, 1914, continued to so act under the direction of the chief probation officer; that the salary attached to the position had been duly fixed by ordinance of the board of supervisors of Los Angeles County at the sum of one hundred dollars per month; that petitioner had presented her demand to appellant auditor, which he had refused to comply with, and that there was sufficient funds in the treasury of the county of Los Angeles available to pay the claim. The facts as they were presented to the trial judge are set out in abstract in a bill of exceptions. It appears that Hugh C. Gibson, the probation officer, testified that on the twelfth day of December, 1913, there were vacancies in several of the positions designated as assistant probation officer, and that the petitioner was at that time nominated by the probation committee of the juvenile court as a candidate to fill one of such positions, and that thereafter she was "appointed to said vacant position by Fred H. Taft, judge of the juvenile court of said county." Further, that the appointment was made in writing, filed in the office of the county clerk, and that petitioner thereupon took the oath of office. This witness further testified that on the fifteenth day of December, 1913, he assigned petitioner to duty in her office and that she had since that time continued to act. Further, the bill of exceptions also contains this clause: "The witness testified further that on the twelfth day of December, 1913, he consented to and was willing that said Mrs. P. T. Anderson be appointed to the said position, and that he did not at any time discharge her." Gibson testified that he had recognized and considered petitioner as the duly qualified and appointed assistant pro-



bation officer of Los Angeles County during all the times material to the controversy. Three letters were introduced in evidence, the first of which was written to Gibson as chief probation officer by the county civil service commission, requesting Gibson to give the names of persons added to his department. This letter bore date the nineteenth day of December, 1913. The second letter was one written by Gibson in answer to the letter just referred to, wherein he (Gibson) stated the names of persons added to his department, which included the name of this petitioner as assistant probation officer. The third letter was written later by Gibson to the probation committee of the county, wherein again was given a list of all employees in the probation office, which list included the name of petitioner as assistant probation officer. An ordinance of the board of supervisors was introduced in evidence, which provided for officers in the probation department as follows: "Section 28. Probation officer, one hundred and fifty dollars per month; provided it shall be and there is hereby allowed to the probation officer the following assistants, clerks, deputies and employees, *who shall be appointed by the probation officer from the eligible civil service list*, and shall be paid as follows: . . . sixteen assistant probation officers at a salary of one hundred dollars per month." This ordinance was shown to have been adopted in June, prior to the date of the alleged appointment of petitioner. It will be noted that the evidence showed that the formal appointment of petitioner as assistant probation officer was attempted to be made by the judge of the superior court. This procedure, no doubt, was adopted because of the view held by the judge of the juvenile department, that under the state juvenile law the power to appoint the probation officers rested with him. In the case of *Gibson v. Civil Service Commission of County of Los Angeles*, 27 Cal. App. 396, [150 Pac. 78], this court decided that, under the provisions of the county charter, the board of supervisors was authorized to make provision for the appointment of these officers, and that where such appointment had been so provided for, the state law ceased to operate as to that matter.

Appellant's claim is that the petitioner herein was not shown to ever have been legally appointed, and that because of such fact she was not entitled to collect salary. It is admitted that at all times material to matters in issue she was at least a *de facto* officer. The acts of a person performing as-

sumed duties as an officer *de facto* ordinarily are regular and valid. However, it does not follow that such *de facto* officer may claim the compensation attached to the office for the performance of such duties. It is held that the collection of the salary or compensation is an incident to the title to the office, and not to its occupation and exercise. (*Burks v. Edgar*, 67 Cal. 182, [7 Pac. 488].) There is then squarely presented the question as to whether petitioner herein, during the time covered by her claim for compensation, was acting under a valid appointment. The amendment to the state constitution adopted in October, 1911, authorized for the first time the framing of freeholders' charters for counties. (Const., art. XI, sec. 7½.) By the terms of this amendment the several things which it is competent for such charters to provide for are set forth in a number of paragraphs. It is therein stated to be competent for charters to provide, and the phrase is used, "and the same shall provide," among other things: "5. For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attachés and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such persons, the times at which, and terms for which they shall be appointed, *and the manner of their appointment and removal; . . .*" The italics have been indicated by us to give emphasis to the clause to be particularly considered in determining the question stated. The ordinance passed by the board of supervisors in June, 1913, which has been referred to and wherein the offices of probation officer and assistant probation officer were provided for, makes no mention of the manner in which said appointments shall be made. It is respondent's argument that, as the question of the "particular manner of the appointment" was left to the board of supervisors, in the absence of any action by ordinance taken to that end, no particular form of appointment was requisite and that such appointment might be made orally. This argument assumes also that because of the charter provisions and the constitutional permission authorizing the adoption of charters, the effect of all general laws touching the matter of the appointment of deputies or assistants is completely nullified. It is admitted that by section 4024, Political Code, appointments of deputies

are required to be in writing and filed with the county clerk. Our opinion is that, where the board of supervisors has failed or declined to exercise a right to legislate as to the manner of appointment of subordinate officers, the general laws of the state touching such matters should govern. The constitutional amendment referred to seems not to restrict the operation of general laws in that regard by any express terms or definite suggestion. There are other sections of the Political Code than the one cited which declare that appointments of deputies must be in writing, and that an oath of office must be taken by the persons appointed. We may refer to Political Code, sections 894 and 910. Section 910 particularly refers to the matter of the oath, and provides that deputies, clerks, and subordinate officers must, "within ten days after receiving notice of their appointment, take and file an oath in the manner required of their principals." The position of respondent that no written appointment was required to be made would have found some authority in precedent were there an entire absence of statutory law upon the subject. (*Bonds v. State*, 8 Tenn. 143, [17 Am. Dec. 795].) Respondent urges, nevertheless, as further ground for sustaining the regularity of petitioner's appointment, that the letters introduced in evidence expressed sufficient to show an appointment in writing made by the probation officer. The case of *People v. Fitzsimmons*, 68 N. Y. 514, is cited as an authority. In that case the mayor, who legally had the right to appoint certain excise commissioners, but thinking that he only had the right to recommend to a city council for confirmation such appointments, did transmit to the latter body in writing his recommendation containing the names of three persons whom he designated as nominees. It was held that such a writing constituted a sufficient appointment. It is well to note that in the opinion the court there says that the mayor "selected the men; he appointed them, and they were no less his appointments after confirmation by the common council." It was clear enough in that case that the persons who assumed office were persons actually selected and nominated in writing by the mayor. But the same court in a later decision, entitled *Babcock v. Murray*, 70 N. Y. 521, declared that the decision in the Fitzsimmons case (*supra*) had been made with "considerable hesitation and not without great doubts." As we understand the attitude of counsel, as impressed in the argument in

briefs, it is not contended that if section 4024 of the Political Code is of effect as governing the manner of appointment of assistant probation officers, the letters would be sufficient evidence of compliance with the requisite formalities. That section provides as follows: "Every county, township, or district officer, except a supervisor or judicial officer, may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy." While it is not argued, we have taken notice of the fact that the provisions of section 4024 might be construed as applicable only to deputies or assistants appointed in excess of those specifically provided for by law. In that event the section would not apply to the assistant probation officers. For that reason we have called attention to section 894 of the Political Code, which provides: "The appointment of deputies, clerks, and subordinate officers, when not otherwise provided for, must be made in writing, filed in the office of the appointing power or the office of its clerk." If we are to say that the last provision was the one under which the appointment should have been made, then it would have been the duty of the chief probation officer to make a record of the appointment in his office in some substantial form and for the person so appointed to take the oath of office. The question is not raised, but, parenthetically, we may suggest that nowhere in the findings of fact does it appear to have been determined that the petitioner ever took an oath of office. That point, however, not having been suggested, reason for this decision is not in any particular to be ascribed to the lack of such finding. The evidence, to our minds, in no wise shows that Gibson, the probation officer, ever selected as his appointee, directly or impliedly, this petitioner. It appears expressly by the evidence that such selection was made by the judge of the juvenile court who, as we have heretofore determined, had no power to appoint. By every reasonable inference to be drawn from the testimony, it seems clear beyond any doubt whatsoever that the chief probation officer assumed that the judge had the right to make the appointment, and accepted the appointment of the petitioner because of that fact and that fact alone. We attach no weight as



determinative of this matter to the statement contained in the evidence that the probation officer consented to and was willing that the petitioner be appointed to the position. He did not so appoint her, and the letters written by him were apparently merely by way of compliance with the regulations of the civil service commission, under the control of whom, as to the making of the reports of his office, he seemed to be.

Having reached the conclusion that the evidence was insufficient to justify the material finding made by the court that petitioner was regularly appointed to her position, we do not think it necessary to pass upon the question suggested in conclusion by the appellant. In the petitioner's complaint it did not appear that the auditor, before demand for the salary warrant was made upon him, had received a certificate from the civil service commission certifying to the correctness of the demand, as section 38 of the Los Angeles County charter provides. Appellant has contended that the auditor could not be compelled by mandate to act until such certificate had been furnished him. In answer to this proposition, respondent contends that the general duties of the auditor, as set forth in section 4091 of the Political Code, do not admit of this certificate being insisted upon as a prerequisite to the issuance of a warrant for a salary amount which is fixed by law. There is no doubt at all but that in defining the duties of the civil service commission it was competent for the charter to provide that such commission should furnish to the auditor evidence that the officers had performed their duties. As to whether, however, the presence of this certificate was a necessary prerequisite to the issuing of the warrant to an officer whose salary is fixed by law, we do not decide.

Under the conclusions expressed it must follow that the petitioner is not entitled to the relief.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1562. First Appellate District.—November 20, 1915.]

**HENRY LUND et al., Copartners, etc., Appellants, v.
ARTHUR LACHMAN, Respondent.**

SALES—ACTION BY SELLER—BREACH OF CONTRACT TO PURCHASE BOTTLES

—MEASURE OF DAMAGES—SECTION 3353, CIVIL CODE.—In an action by a seller for breach of a contract to purchase a certain specified quantity of quart bottles, the measure of damages is that fixed by section 3353 of the Civil Code, which provides that in estimating damages the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale.

ID.—EVIDENCE—LACK OF DILIGENCE IN MAKING SALES—NOMINAL DAMAGES.—Where, in such an action, it is shown that the seller, upon the refusal of the buyer to accept the goods, removed the same to a warehouse, where they were stored and insured, and from time to time sold at private sale at varying prices for an aggregate sum less than the sum total of the contract price, instead of being taken to the nearest market, where they could have been sold at an advance of the contract price, the seller is entitled at most to but nominal damages.

ID.—DUTY OF SELLER—PROCURING OF HIGHEST MARKET PRICE—CONSTRUCTION OF SECTION 3353, CIVIL CODE.—Under the provisions of section 3353 of the Civil Code, it is the duty of the seller, regardless of his business capacity or ability along the particular line of goods forming the subject matter of the broken contract, to go into the open market and obtain for the rejected goods the highest obtainable market price therefor.

ID.—MARKET VALUE—MEANING OF.—The market value of a commodity is the highest price in the market where it is offered for sale which those having the means and inclination to buy are willing to pay for it.

ID.—EVIDENCE—PREVAILING MARKET PRICE.—In such an action it is not error to permit evidence of the prevailing market price during the period following the tender and rejection of the bottles.

ID.—FAILURE TO ALLOW NOMINAL DAMAGES—INSUFFICIENT GROUND FOR REVERSAL.—In such an action, the refusal to allow the plaintiff at least nominal damages will not warrant the reversal of the judgment or the granting of a new trial, as such a judgment would not carry costs.

ID.—NOMINAL DAMAGES—COSTS.—Nominal damages have been defined to mean merely an inconsiderable, trifling sum, such as a penny, one cent, six cents, and to carry costs a judgment of the superior court must amount to the sum of three hundred dollars.



APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

H. W. Glensor, for Appellants.

Jesse H. Steinhart, for Respondent.

LENNON, P. J.—This is an action for damages for the alleged breach of a contract to purchase personal property. The appeal is from the judgment in favor of the defendant and from the order denying a new trial.

The facts of the case as revealed by the pleadings and proof are substantially these: On November 30 and December 1, 1910, the defendant entered into two contracts with the plaintiffs for the purchase of certain specified quantities of claret quart bottles, to be shipped from Sweden during the months of February or March, 1911. The contract price was \$5.85 per gross, and delivery was to be made from the ship's side at San Francisco. The bottles arrived at San Francisco on the steamship "Strathbeg" on June 15, 1911. They were tendered to the defendant on June 16, 1911, and refused by him. The bottles were thereupon removed to a warehouse by the plaintiffs, where they were stored and insured, and from time to time sold at private sale at varying prices for the aggregate sum of \$2,912.85, which was \$12.15 less than the sum total of the purchase price specified in both contracts.

The trial court in its findings of fact found that the plaintiffs did not use due or any diligence in making sales of the bottles; that the several sums obtained therefor at the several sales were not separately or *in toto* the highest obtainable market price; and that plaintiffs were not compelled to have such bottles removed to a warehouse because of the defendant's breach of the contracts.

The bottles having been sold at private sale, and it being an admitted fact in the case that title to the bottles had not passed from the plaintiffs, it is conceded, as it must be, that plaintiffs' only remedy was damages for the breach of the contracts (*Cuthill v. Peabody*, 19 Cal. App. 304, [125 Pac. 926]); and that the measure of the damages alleged to have been thereby

sustained is to be found in section 3353 of the Civil Code, which provides that "In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

In addition to claiming that the findings are contrary to the evidence concerning the market value of the bottles and the necessity for their removal to a warehouse as a result of the defendant's breach of the contracts, it is insisted that the plaintiffs should have been allowed five per cent commission as compensation for the cost of making the several resales of the bottles.

The evidence adduced on behalf of the plaintiffs shows that the bottles were sold at a series of sales made during a period of time extending from July 6, 1911, to March 20, 1912, at approximately \$5.75 per gross, and there was some evidence, competent and uncontradicted, adduced upon behalf of the defendant, to the effect that during the month of June, 1911, there was in the city and county of San Francisco, the place where the bottles should have been accepted by the defendant, a well-established and active market price for bottles similar to those contracted for by the defendant, which ranged from \$6.25 to \$7.25 per gross. The evidence also shows that the business of the plaintiffs was that of steamship freighters, importers, and exporters, and that the sale of the bottles in question was intrusted to a salesman of the plaintiffs, whose specialty was that of selling iron, coke, and pig iron; and Carl Bundschu, manager of the Gundlach-Bundschu Wine Company, as a witness for the defendant, testified that "About the month of July, 1911, there was sold to us by Henry Lund & Co. a gross of claret bottles at \$5.85 a bale. That was below the market price, cheaper than I could buy elsewhere." The salesman of the plaintiffs, in explanation and justification of the price procured for 387 bales of the bottles in question, which he had sold in or about the month of March, 1912, to one Rosenberg, testified that at that time he was unaware of the fact that there was a scarcity of bottles in the local market resulting from a scarcity of bottles in Germany and Sweden,

and that it was this fact known to Rosenberg at the time of the sale which prompted the latter to make the purchase.

Counsel for the plaintiffs in effect concede that such evidence was sufficient to warrant and support the finding of the trial court that the plaintiffs had failed and neglected to procure the highest obtainable market price for the bottles, if section 3353 of the Civil Code is to be construed "as requiring the seller, regardless of his business capacity or ability along the particular line of goods forming the subject matter of the broken contracts, to go into the open market and obtain for the rejected goods a price as high or higher than any other firm or individual is getting. . . ." In other words, it is the contention of the counsel for the plaintiffs that it was the intent and purpose of section 3353 of the Civil Code to provide that the value of the property to the seller is the price which he personally could obtain for it, regardless of what the market price thereof may have been. That this contention is utterly without merit is, we think, manifest upon a casual consideration of the language employed in the code section under discussion; but even if that were not so, the section has in effect been held to mean that the seller of rejected property who seeks to recoup his loss, if any, by a private sale, must resort to such resale in the open market and at market values. (*Hull v. McKay*, 94 Cal. 5, [29 Pac. 406]; *Willson v. Gregory*, 2 Cal. App. 312, [84 Pac. 356]; *Welch v. Nichols*, 41 Mont. 435, [110 Pac. 89].) Obviously, the market value of a commodity is the highest price in the market where it is offered for sale which those having the means and inclination to buy are willing to pay for it; and it is equally obvious, we think, that market values are created and controlled by the condition of the market with reference to supply and demand rather than by the particular or peculiar selling ability of the seller.

This view of the law compels the conclusion that the evidence sustains the finding of the trial court concerning the failure of the plaintiffs to procure the highest market price obtainable for the bottles in question; and inasmuch as there is some evidence tending to show that at the very time the contract was breached, and subsequently, there was at San Francisco an active market for bottles of the character and quantity called for in the contracts in controversy, with a market price therefor ranging from \$6.25 to \$7.50 per gross,

which was far in excess of the contract price, it cannot be said that the evidence does not support the finding of the trial court to the effect that the plaintiffs were not compelled to store the bottles because of the defendant's failure to accept them. While it was not incumbent upon the plaintiffs to make the resale immediately after the repudiation of the contract by the defendant, nevertheless the plaintiffs were required to exercise reasonable diligence in locating the nearest market, and ascertaining the prevailing market price for the rejected bottles; and there can be no doubt that there was sufficient evidence to justify the trial court in finding that if the plaintiffs had seen fit to seek and take the market price for the bottles which prevailed on the day and for many days following their arrival and tender and rejection at San Francisco, they could have sold them at a substantial advance over the contract price which would have more than covered the expense of drayage, storage, and insurance for a reasonable time had such expense been found to be necessary, and therefore in no event would the plaintiffs have been entitled to recover such expense from the defendant.

What we have said thus far in effect disposes of the point that the plaintiffs were entitled to interest upon the amount of damage accruing from the defendant's breach of the contracts, and to compensation for making the resale, in the form of a commission upon the price obtained. Assuming that the plaintiffs ordinarily would have been entitled to recover such items as a part of their damage, nevertheless it is obvious that if the plaintiffs failed—as the court upon sufficient evidence found—to take advantage of prevailing market prices which would have more than made them whole, they cannot now predicate a claim for damage upon such items any more than upon the other elements of damage already considered.

The view which we have taken of the meaning and intent of section 3353 of the Civil Code compels the conclusion that the trial court did not err in its rulings permitting evidence of the prevailing market value during the period following the tender and rejection of the bottles.

The judgment and order are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 20, 1915, and the following opinion then rendered thereon:

THE COURT.—On petition for rehearing the only point urged is that the original opinion failed to take cognizance of the point presented and discussed in the briefs of counsel for the plaintiffs, that the judgment should be reversed because the trial court refused to allow the plaintiffs at least nominal damages. While this point did not escape the attention of this court upon the original consideration of this case, a discussion of it was inadvertently omitted from the opinion. It will suffice to say at this time that it is the settled rule that where a judgment is erroneous only in the particular that it did not include nominal damages, it will not be reversed nor a new trial granted unless it be made to appear that such damages, if they had been allowed, would have carried costs. (Sutherland on Damages, sec. 11; *Kenyon v. Western Union etc. Co.*, 100 Cal. 454, [35 Pac. 75].) Nominal damages have been defined to mean merely an inconsiderable, trifling sum; such as "a penny, one cent, six cents" (*Davidson v. Devine*, 70 Cal. 519, [11 Pac. 664]; *Maher v. Wilson*, 139 Cal. 514, [73 Pac. 418]); and to carry costs, a judgment of the superior court must amount to the sum of three hundred dollars. (Code Civ. Proc., secs. 1022, 1025.) Such a judgment obviously could not be considered to be one for nominal damages as above defined (*Broads v. Mead*, 159 Cal. 765, [Ann. Cas. 1912C, 1125, 116 Pac. 46]); and as the judgment in the present case would have to amount to three hundred dollars before it could carry costs, it follows that a judgment for nominal damages would not carry costs. We are satisfied that in no event could the plaintiffs, under the pleaded and proven facts of the present case, have been allowed more than nominal damages; consequently the error, if any, in the particular stated will not suffice under the authorities above cited to warrant the reversal of the judgment or the granting of a new trial.

The petition for a rehearing is denied.

[Civ. No. 1429. Third Appellate District.—November 20, 1915.]

CARL BENSON, Appellant, v. GERDA BENSON,
Respondent.

DIVORCE—SUBSEQUENT ACTION—RES ADJUDICATA.—In an action for divorce, wherein the decree was granted to the wife upon her cross-complaint alleging extreme cruelty, the plaintiff cannot contend that the matters set up in such cross-complaint were made issues by the respective pleadings in a former divorce action denying the parties a divorce, where the plaintiff in his answer to such cross-complaint failed to plead to such judgment, and there is nothing in the record relating to such judgment, other than the mere pleading of the same in the answer to the original complaint.

ID.—EXTREME CRUELTY—ACTS SUBSEQUENT TO FORMER JUDGMENT—PLEA OF RES ADJUDICATA NOT MAINTAINABLE.—A plea of *res adjudicata* cannot be maintained against an action for divorce on the ground of extreme cruelty, where the acts charged occurred after the judgment in the former action was rendered.

ID.—EVIDENCE—WILLINGNESS TO RETURN TO HUSBAND—EXCLUSION OF TESTIMONY—LACK OF PREJUDICE.—In an action for divorce wherein a decree was granted to the wife upon her cross-complaint alleging extreme cruelty, it is not prejudicial error to refuse to permit her on cross-examination to state whether or not she was willing to go back to her husband, and live with him, where it appears from the evidence that such question would have been answered in the negative if allowed, and that both parties had been persistently engaged in an effort to get rid of each other upon what appears to be sufficient reason.

ID.—SUPPORT AND MAINTENANCE OF MINOR CHILDREN—REASONABLE ALLOWANCE.—An allowance of fifteen dollars per month to each of the three minor children of the marriage for their support and maintenance is not unreasonable as against the father, where he is shown to be a carpenter and building contractor, earning good wages, and usually employed.

APPEAL from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Austin Lewis, and R. M. Royce, for Appellant.

John D. Willard, and Gilbert D. Ferrell, for Respondent.

HART, J.—The court below rendered and entered its interlocutory decree, adjudging the defendant to be entitled to a divorce upon her cross-complaint, and awarding her a one-half interest in the community property and the custody of three minor children, issue of the marriage of the parties, and making an allowance of \$15 per month to each of said children for their support and maintenance.

This appeal is by the plaintiff from the judgment so rendered and entered.

The complaint is in two counts, the one in due form charging the defendant with willfully deserting the plaintiff in the month of October, 1908, and the second alleging extreme cruelty on the part of the defendant toward the plaintiff. Certain specific acts of cruelty are set forth in the latter count, and in substance they are: That the defendant had been in the habit of bestowing unbecoming attention on men other than her husband, and that, in the month of July, 1908, the plaintiff discovered "that she had a man other than her husband in her bedroom"; that defendant on numerous occasions expressed to the plaintiff a preference for other men over him; that the defendant abused their children, being in the habit of addressing them in harsh and abusive language, and had threatened to kill said children on many occasions; that she refused to prepare meals for said children, and refused to "dress them" or give them other necessary attentions due from a mother to her minor children, with the result that the plaintiff was required to prepare their meals for them and otherwise minister to the necessities of said minors; that, on the eighth day of December, 1912, the defendant said to the plaintiff that she desired to have nothing more to do with either their minor children or him, and that she "refuses to have anything to do with the said children, and that plaintiff provides for them in every respect," etc.

The defendant answered the complaint by specific denials of the allegations of each of the counts thereof, and, furthermore, pleaded in bar of the plaintiff's action, a former judgment in an action for a divorce, wherein the defendant here was plaintiff and cross-defendant and the plaintiff here defendant and cross-complainant. The defendant also filed a cross-complaint herein, in which she charges, separately and in different counts, that the plaintiff had willfully deserted her, had neglected and failed to provide for her the common

necessaries of life for and during the year immediately preceding the filing herein of her cross-complaint, and that the plaintiff had been guilty of extreme cruelty toward her in divers ways and on numerous occasions, such acts of cruelty being specifically set out.

The plaintiff made answer to the cross-complaint.

No evidence was offered in support of the defendant's plea of *res adjudicata*.

The court made no findings upon the causes of action for desertion and failure to provide set up in the defendant's cross-complaint. It did, however, in substance find as to the cause of action therein stated involving the charge of extreme cruelty, that the plaintiff for and during the course of a number of years prior to the date of the institution of this action by the plaintiff and cross-defendant, on numerous occasions, and often in the presence of other persons, had called the defendant and cross-complainant vile and, indeed, unprintable names; that he, during that time, told other people, in her absence, that she was an immoral woman, and that the persons to whom he so spoke of her had communicated to her the fact of his denunciation of her in the manner indicated; that, without cause or provocation therefor, he attempted to strike her on one occasion, and but for the interference and protection she received at the hands of a Mr. Ellis, who was then present, he would have struck and inflicted upon her serious bodily injury; that on said occasion he, in the presence of strangers, called her a liar, a thief, and a fool, and said she was not a moral or respectable or virtuous woman, and asseverated "that he would not live with said Gerda Benson again, even if she begged him to allow her to live with him"; that for many years he had kept up a continuous abuse of the defendant and cross-complainant of a character which made it impossible for her to live in peace or happiness with him.

There is no claim here that the evidence does not support the allegations of cruelty of the cross-complaint or the findings upon which the judgment is planted. It is contended, however: 1. That each and all of the matters set up by the defendant in the several counts of her cross-complaint were made issues by the respective pleadings in the former divorce action between the parties, and were adjudicated by the judgment therein, whereby the court denied to both of the

parties the relief prayed for in their complaint and cross-complaint, respectively, filed in said action, and dismissed the said action and all the proceedings therein. 2. That the court erred to the serious detriment of the rights of the plaintiff by refusing to allow certain testimony to be received. 3. That the allowance for the support of the minor children is too large, and not justified.

There are two conclusive answers to the first of the propositions above stated: 1. That the plaintiff, in his answer to the cross-complaint of the defendant, did not plead the former judgment, nor was there proof thereof offered or received under the plea of estoppel based upon said judgment set up by the defendant in her answer to the complaint. The judgment-roll in said former action was not introduced in evidence by either party, and the defendant having merely pleaded in her answer the cross-complaint of the plaintiff here (defendant there) and the judgment in said action, there is nothing in the record disclosing the grounds upon which the defendant here as plaintiff in the former action relied for a divorce. 2. It appears that the acts of cruelty charged in the cross-complaint of the defendant in the present action occurred after the judgment in the former action was rendered and entered, and in such case, of course, the plea of *res adjudicata* cannot be maintained. There is nothing said in *Civille v. Civille*, 22 Cal. App. 707, [136 Pac. 503], cited by appellant, in conflict with this declaration.

Counsel for the plaintiff asked the defendant on cross-examination the following question, to which objection was made by the defendant and sustained by the court: "Are you willing to go back to Mr. Benson and live with him?" It is here urged that the ruling was error and prejudicial. Of course, if a reply to the question had been allowed, and the defendant had answered in the affirmative, it might have had some tendency to weaken her testimony as to the nature and extent of the acts of cruelty of which she said her husband had been guilty. But, having given testimony in the most emphatic manner of outrageous acts of cruelty habitually inflicted upon her by the plaintiff for many years prior to the filing of her cross-complaint in this action, it is more than probable that the defendant would not have answered the question in the affirmative, as evidently counsel desired might be the answer. But, however that may be, we do not

think that the ruling, even if not strictly correct, should be held to afford a sufficient reason for sending the cause back for retrial, particularly since it appears to be true that both parties have persistently been engaged in an effort to get rid of each other as husband and wife upon what appears to be sufficient reason.

As to the last of the propositions above stated, it is said that "the allowance to the wife is out of all proportion to the financial status of the parties."

The allowance was not made to the wife, but solely to and for the support and maintenance of the minor children of the parties. The amount allowed for that purpose to each of said children is fifteen dollars or a total of forty-five dollars per month. The evidence showed that the plaintiff is a carpenter and building contractor, earns good wages, and is usually employed. We cannot say that the allowance is unreasonable as to the plaintiff or beyond what may be reasonably required to support and maintain the children in a manner consistent with the plaintiff's circumstances and earning ability.

No other points are raised.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1390. Second Appellate District.—November 22, 1915.]

S. W. KEISER, Respondent, v. J. H. LEVERING,
Appellant.

CLAIM AND DELIVERY—PLEADING—VALUE OF PROPERTY.—A complaint in an action to recover the possession of mortgaged personal property, which contains no allegation showing the value of the demanded property other than that contained in a copy of the mortgage attached to the complaint, which purports to give the value of some of the mortgaged articles, is insufficient, as an allegation of value at the time of filing the complaint.

Id.—RECITALS IN CONTRACT—INSUFFICIENT PLEADING.—Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading.

ID.—JUDGMENT FOR VALUE OF PROPERTY—EXCESS OF INDEBTEDNESS.—

In such an action a judgment for the possession of all the mortgaged property or for its value in case delivery thereof cannot be had is excessive, where the indebtedness for security of which the property was mortgaged does not amount to one-half of such value.

ID.—JUDGMENT—ALTERNATIVE FORM.—In an action to recover the possession of personal property, while the judgment must ordinarily be in the alternative, yet a judgment that is not in that form is not void, and whether or not it is even erroneous must depend upon the facts of the particular case.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. John M. York, Judge.

The facts are stated in the opinion of the court.

Harry L. Dearing, and T. C. Gould, for Appellant.

A. C. Galloway, Wm. L. Jarrott, and James S. Jarrott, for Respondent.

CONREY, P. J.—This is an action to recover possession of personal property. From a judgment in favor of the plaintiff, and from an order denying defendant's motion for a new trial, the defendant appeals.

By the first count of the complaint it appears that the defendant made to the plaintiff a chattel mortgage securing a note on which there was due at the time of filing the complaint the sum of \$835. The mortgage contained the usual provision entitling plaintiff to possession of the property, with right of sale to satisfy his claim whenever default should be made on the defendant's obligation. The facts of such default and of demand for possession and of refusal by the defendant are alleged, which the plaintiff averred are to his damage in the sum of \$835. Defendant demurred separately to each count of the complaint on the general ground as to each count that it did not state facts sufficient to constitute a cause of action, and also on special grounds which we need not discuss. The demurrer was overruled, and answer filed. In support of the general demurrer, defendant contends that the first count does not contain any allegations showing the value of the demanded property, and claims that an allegation of such value is essential to the cause of action. The

plaintiff in this first count alleges the execution of the mortgage, a copy of which is attached to the complaint, "and made a part hereof to all intents and purposes the same as if recited at length herein." The schedule of mortgaged articles as set forth in the mortgage purports to give the value of some of those articles. Allowing this as an allegation of value, it would only specify the values at the date of the mortgage and not as of the time of filing the complaint, unless we could assume that such values continued unchanged. It is settled law that recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. Thus, where the complaint alleged the making of a note set forth by copy and the note recited that it was "secured by mortgage of even date herewith," it was held that this did not amount to an averment that the note was secured by mortgage. (*Hibernia Savings & Loan Society v. Thornton*, 117 Cal. 481, [49 Pac. 573]; *Hayt v. Bentel*, 164 Cal. 681, 686, [130 Pac. 432].)

The contention that a statement of value of personal property in an action to recover possession thereof is essential to the cause of action seems to be based upon the fact that in such action judgment for the plaintiff may be for the possession, or the value thereof in case delivery cannot be had, and damages for the detention. (Code Civ. Proc., sec. 667.) In the earlier cases it was held to be imperative that the judgment be in the alternative form, and such judgments for possession only, without providing for a recovery of the value thereof in case delivery could not be had, were reversed even at the instance of the defendant. (*Berson v. Nunan*, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5, [8 Pac. 605]; and other cases.) But this rule was seriously questioned in *Claudius v. Aguirre*, 89 Cal. 501, 506, [26 Pac. 1077], and *Erreca v. Meyer*, 142 Cal. 308, 310, [75 Pac. 826]. The law seems to be that, while the judgment must ordinarily be in the alternative, yet "a judgment that is not in the alternative is not, however, void, and whether or not such a judgment is even erroneous must depend upon the facts of the particular case." These later decisions might be sufficient to support a complaint and judgment for mere possession of property without regard to the value thereof, if the case as a whole appeared to be within the jurisdiction of the court; but could not possibly support a judgment for the value as

specified by the court in its findings where no value was alleged in the complaint. This is important in the present case, as will appear in our further statement of it.

The second count of the complaint in this action alleges the execution of another note and chattel mortgage by the defendant to the plaintiff, upon which at the date of filing the complaint there was alleged to be due the sum of \$359.12. This count is similar to the other, except that the second count alleges the value of the property sought to be recovered therein to be the sum of \$1,200. The property described in the second mortgage is in part identical with that described in the first mortgage, but some of the original items are omitted and others are added. The defendant in his answer did not deny the allegation of value set forth in the second count, and the court found—as the defendant also admitted—the amount of indebtedness on each mortgage note to be substantially as stated in the complaint. The court found as a fact the total value of the property in the possession of the defendant to be the sum of \$970. The judgment is for possession of all of the mortgaged property described in the findings and judgment, or if delivery thereof could not be had, that plaintiff recover from defendant the sum of \$970 and specified costs.

Manifestly, the judgment is for an excessive amount. For the reasons heretofore stated, no part of the \$970 can be charged against the cause of action stated, or attempted to be stated, in the first count of the complaint; and as to the second count, although it may be that the property involved therein is worth as much as \$970, the debt for security of which it was mortgaged by the second mortgage did not amount to half that sum, as stated in the complaint. In *Pico v. Martinez*, 55 Cal. 148, which was an action of claim and delivery of personal property, it was held that, where the goods had been taken from the defendant and the judgment was that the defendant was entitled to possession of them, and it further appeared that the defendant had only a special and limited interest in the property, the amount of his recovery under the alternative provision in the judgment must be limited to the value of his special and limited property in the goods, and was not to be measured by the entire value thereof. If this is the rule applicable in the instance of a judgment in favor of the defendant, under section 667

of the Code of Civil Procedure, it is equally applicable in the case of a judgment in favor of the plaintiff. Since in the present case the plaintiff's right to have possession of the described property is only claimed for the purpose of satisfying his claims for an indebtedness unpaid to him, and since no special damages are either alleged or proved, it is clear that the value of the property to him cannot exceed the amount of the indebtedness unpaid; and this amount in the present state of the pleadings is limited to the indebtedness shown in the second count of the complaint.

The judgment and the order denying defendant's motion for a new trial are reversed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 21, 1915.

[Civ. No. 1768. First Appellate District.—November 23, 1915.]

MARTHA WASHINGTON COUNCIL No. 2, DAUGHTERS OF LIBERTY OF THE STATE OF CALIFORNIA, et al., Petitioners, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO and GEO. E. CROTHERS, One of the Judges Thereof, Respondents.

JUSTICE'S COURT—DISMISSAL OF ACTION—NONJUSTIFICATION OF SURETIES—FILING OF NEW UNDERTAKING.—Under the latter portion of section 978a of the Code of Civil Procedure, it is the duty of the appellant, after exception taken to the sufficiency of the sureties upon the undertaking on a justice's court appeal, to cause such sureties, or others in their place, to justify after notice and within the time specified in the statute, and where, instead of doing so, an appellant files a second undertaking within such time which has for its purpose the supplying of an inadvertent omission of the word "house" in the expression "is a householder," in the part of the undertaking referring to the qualification of the sureties, no jurisdiction is acquired of the appeal.

APPLICATION for a Writ of Mandate originally made in the District Court of Appeal for the First Appellate District,

directed to the Superior Court of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Clarence A. Henning, for Petitioners.

T. C. Van Ness, Jr., for Respondents.

KERRIGAN, J.—In this proceeding the petitioners seek the issuance of a writ of mandate to compel the respondent to vacate a certain order made by it dismissing an appeal taken by the petitioners from a judgment rendered in an action tried in the justice's court. Such judgment was entered on the thirty-first day of December, 1914, in favor of one E. F. Trimble, the plaintiff therein, against the petitioners here, who were the defendants in that action. Thereafter and on the thirtieth day of January, 1915, the petitioners filed and served a notice of appeal from the judgment of the justice's court, and on the same day filed an undertaking on appeal, and served notice on the plaintiff therein of the filing thereof. Subsequently, to wit, on February 3, 1915, the plaintiff excepted to the sufficiency of the sureties named in the undertaking. Fearing that said undertaking was defective because of the omission of the word "house" in the expression "is a householder" in that part of the bond referring to the qualifications of the sureties, the petitioners made no attempt to have the sureties on that bond justify, but on February 4th filed a second undertaking on appeal in which the omission was rectified, and on the same day served the plaintiff with notice of the filing of the new undertaking. Upon motion of the plaintiff the superior court, after a hearing had thereon, dismissed the appeal upon the ground that the sureties upon the undertaking of January 30, 1915, or other sureties in their stead, had failed to justify after written exception to their sufficiency had been served as provided by law. It is to compel the vacating of such order of dismissal that the writ of mandate in this proceeding is sought.

We think the order of the superior court must be sustained. An appeal from the judgment of a justice's court may be taken at any time within thirty days after the rendition of the judgment, and the appeal is taken by filing a notice with the

justice and serving a copy thereof on the adverse party. (Code Civ. Proc., sec. 974.) "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

According to the wording of the latter part of section 978a of the Code of Civil Procedure, we do not doubt that it was the duty of the appellants, after the exception to the sufficiency of the sureties was duly taken, to cause those sureties—or others in their place—to justify after notice and within the time specified in the statute; and that in failing to do so the appeal was unavailing. It may be that the course of action adopted by the appellants in filing the second bond would have been correct if the first bond, as they seem to suppose, was absolutely void because of the failure to declare in the affidavit accompanying it that the sureties were freeholders or householders. In that event the bond might perhaps have been regarded as almost a blank piece of paper, but the first undertaking in fact filed was not invalid by reason of the inadvertent omission of the word "house." (*Rauer's Law & Collection Co. v. Superior Court*, 169 Cal. 296, [146 Pac. 866].)

That part of section 978a of the Code of Civil Procedure relating to the justification of sureties is but a re-enactment of the same matter which theretofore was a part of section 978 (*Jeffries Co. v. Superior Court*, 13 Cal. App. 193, 196, [109 Pac. 147]), and hence the early cases construing that language, of course, are unaffected by the amendment. In the case of *Wood v. Superior Court*, 67 Cal. 115, [7 Pac. 200], the appellant in perfecting his appeal from a judgment in the justice's court, gave an undertaking, and upon exception having been taken to the sufficiency of the sureties the appellant, instead of having those sureties—or others in their stead—justify, filed a new bond with new sureties, and in so doing, says the court, "he gave no notice as required by the last clause of section 978 of the Code of Civil Procedure. Such

being the case, 'the appeal must be regarded as if no such undertaking had been given.' The statute is peremptory. Without the justification of the sureties named in the undertaking, or other sureties in their stead, upon notice to the adverse party, the appeal was not perfected, and the superior court had no jurisdiction of the case."

That case was followed by the supreme court in *Herting v. Superior Court* (Cal.), 10 Pac. 514. There, after notice had been filed and served on appellant excepting to the sufficiency of the sureties in an undertaking on appeal from a judgment of the justice's court to the superior court, a new undertaking was filed, with new sureties, but no notice of the justification of the sureties in that undertaking was given to the adverse party, and it was held that the appellant had lost the benefit of his appeal.

In *State v. Napton*, 24 Mont. 450, 455, [62 Pac. 686], the court passed upon the point here involved, and construed the same language. There, too, exception to the sufficiency of the sureties upon an appeal bond had been taken. Within the five days allowed for the justification of the sureties the appellant filed and gave notice of the filing of a new undertaking, executed by sureties other than those who had signed the first undertaking. None of the sureties justified, nor was notice that they would justify ever given. The court held that the section was mandatory; that unless the original sureties or other sureties justified within five days after the exception taken, upon notice to the adverse party, the appeal must be regarded as if no such undertaking had been given, the appellate court in such a case had no jurisdiction of the action upon the appeal, citing *Wood v. Superior Court*, *supra*; *McCracken v. Superior Court*, 86 Cal. 74, [24 Pac. 845]; *Moffat v. Greenwalt*, 90 Cal. 368, [27 Pac. 296].)

For the reasons stated we think the appeal was not effectual for any purpose, and that the superior court acquired no jurisdiction of the case.

Counsel for the petitioner in his brief has, for some reason not apparent to the court, seen fit to indulge in a flood of abuse directed against his opponent. Especially is this court surprised at the conduct of counsel in this respect inasmuch as respondent's counsel presented his argument with courtesy, dignity, and ability. Such a brief is of no assistance to this court, nor in our opinion should its files be marred by

a document of the character in question. It is therefore ordered that the said brief of petitioner be stricken from the files.

For the reasons heretofore stated the writ is denied.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 23, 1915, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 20, 1916.

[Civ. No. 1432. Third Appellate District.—November 27, 1915.]

P. J. O'REILLY, Respondent, v. ALL PERSONS, etc.,
Defendants; JOSEPHINE E. HOPKINS et al., Appel-
lants.

TAXATION—INVALID SALE—REIMBURSEMENT OF PURCHASER—AMOUNT OF TAXES AND COSTS.—A purchaser of lands at a delinquent tax sale is not entitled, upon the sale being declared invalid, to have paid to him by the owner the excess of the sum paid for the lands over and above the taxes, interest, penalties, and costs which were chargeable upon the lands at the time of the sale.

ID.—OBJECT OF SALE.—The primary object of the state in selling the land is to recover the taxes, penalties, costs, etc., and whoever pays more than the amount thereof does so as a volunteer, and at the risk of the proceedings being found invalid.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Samuel M. Shortridge, for Appellants.

Frank J. Hennessy, for Respondent.

BURNETT, J.—The action was brought under the McEnerney Act to establish title to two parcels of land. Appel-

lants in their answer denied that plaintiff was the owner or in the actual possession of parcel A of the said real estate, and averred that they are and were at the beginning of the action, and had been long prior thereto, the owners of said parcel in fee simple absolute as tenants in common and in the possession thereof, and prayed that plaintiff take nothing as to said parcel, but they did not ask for affirmative relief. No question was raised as to plaintiff's ownership of the other parcel, and it is not involved in this appeal.

At the trial it developed that plaintiff claimed said parcel A under a tax title, and it was admitted that if said tax title was invalid, then appellants were the owners of said tract as claimed in their answer. The court found that the said defendants were at the time of the said tax sale, and ever since have been, the owners in fee simple absolute of said real property, and, further, that the said tax sale and the said tax deed executed pursuant to said sale and purporting to convey said property were and are invalid. These findings have not been questioned, the plaintiff not having moved for a new trial or appealed. The court further found, however: "That the said plaintiff purchased said property from the state of California at a tax sale held on the seventh day of February, 1912, and paid for said property at said sale the sum of \$740 in gold coin of the United States of America, and that said plaintiff has since said tax sale aforesaid, expended the sum of \$15.43 in the payment of taxes regularly levied upon said property," and the court thereupon decreed that plaintiff have judgment against said defendants for the sum of \$740 and interest, the further sum of \$15.43, and that said judgment be a lien upon said parcel of real property, and that said defendants be directed to pay the same within sixty days, and in the event of their failure so to do, that plaintiff be entitled to have a writ of execution to enforce the same, and that until said payment be made, the judgment in favor of defendants be of no force and effect.

The court did not find the amount of the taxes, penalties, interest, and costs which were chargeable upon said lands at the time of the said tax sale, but it was conceded at the trial that the amount of the same was \$45.82.

Appellants appeal from the portion of said judgment requiring of them the payment of the said purchase price of said parcel of land, and they state in their brief that "The

substantial dispute between respondent and appellants is whether plaintiff is entitled to the excess of the sum bid and paid by him over and above the taxes, interest, penalties, and costs justly chargeable upon the lands at the time of the invalid tax sale, and that is the sole question presented by this appeal."

That question, it may be said, has been settled by a decision of this court, a petition for hearing in the supreme court being denied, and it is sufficient to quote the following from *Cordano v. Kelsey*, 28 Cal. App. 9, [151 Pac. 391]: "We do not think that the owner should be required to pay whatever competitive bidders may choose to offer for the land in addition to what the law makes it the duty of the owner to pay. The primary object of the state in selling the land is to recover the taxes, penalties, costs, etc., and this is indicated by the requirement of the law that the land must be sold for an amount not less than these enumerated charges. Whoever pays more at the sale does so as a volunteer, and at the risk of the proceedings being found invalid. The rule contended for by appellants would relieve the purchaser of all risk, and make it possible for him to invest his money safely by purchase at tax sales at seven per cent interest, regardless of any infirmity in his title and regardless of the amount he might bid for the property. This, we think, would crowd the rule off from equitable foundations."

The only remaining question is whether, upon the record as presented here, this court can direct a modification of the judgment so as to require appellants to pay to plaintiff only the amount chargeable for taxes, penalties, and costs.

Strictly speaking, no such issue was presented by the pleadings, each of the parties claiming the absolute title. The finding, therefore, as to the \$740 was beyond the scope of the pleadings, but we find from the record brought up that evidence as to such payment and also as to the amount actually paid for taxes, penalties, and costs was received without objection, and, indeed, there is no controversy as to said amounts. Hence it could properly be said that the trial was had upon the theory that such consideration was involved in the issues submitted for decision, and neither party at this time could justly disclaim it.

There is no finding, though, as to the amount paid for taxes prior to said sale, and to pursue the course suggested

by appellants would be for us to make a finding for the trial court, which, of course, would be a departure from a well-established rule. It is probably true that if we should direct a modification as requested by appellants, it would be without prejudice, as was the case in *Campbell v. Cauty*, 162 Cal. 382, [123 Pac. 266].

However, the more orderly course, we think, and one no more burdensome, would be to direct the lower court to make the additional finding in the usual manner. Indeed, appellants recognized the propriety of such action in their motion for a new trial.

It is therefore ordered that the judgment be vacated and the order denying the motion for a new trial be reversed, and the cause is remanded for a new trial as to one issue alone—that is, the amount paid by respondent for taxes, penalties, and costs, and upon the determination and finding of said amount, with interest, it is ordered that judgment be entered requiring appellants to pay said amount, and that upon the payment of said amount, their title to said parcel of real property be established and quieted.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1382. Third Appellate District.—November 27, 1915.]

MARTIN JOHNSON, Respondent, v. DIXON FARMS COMPANY (a Corporation), Appellant.

SALES—PERSONAL PROPERTY—DELIVERY NOT ESSENTIAL.—A “sale” is a contract by which, for a pecuniary consideration, called a price, one transfers an interest in property, and it may be consummated without a delivery of the property to the vendee.

ID.—DELIVERY OF POSSESSION—RULE OF EVIDENCE.—The rule requiring the possession of personal property to be delivered to the vendee to render the sale valid as against the creditors of the vendor is one of evidence only, and in no way enters into the contract of sale as an element thereof, so far as the parties thereto are themselves concerned.

ID.—ACTION FOR PURCHASE PRICE OF HAY—PLEADING—OMISSION TO ALLEGE DELIVERY—SUFFICIENCY OF COMPLAINT.—A complaint in an action to recover the purchase price of certain hay which alleges that

the plaintiff on or about a designated date "sold" to the defendant such property, that the latter promised to pay for the same, and that it had defaulted in its promise, states a cause of action, and no averment of delivery is essential.

ID.—AMENDMENT OF COMPLAINT—SHOWING OF DELIVERY—NONSERVICE OF COPY—LACK OF PREJUDICE.—An order made during the trial permitting the plaintiff to amend his complaint by adding words thereto showing a delivery of the hay, and the failure of the plaintiff to serve a copy of such amendment upon the defendant, which was not represented at the trial and which merely filed an unverified answer to the verified complaint, is not a sufficient ground of reversal, in view of the amendment of section 4½ of article VI of the constitution.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

T. T. C. Gregory, Thomas A. Allen, and Dan Hadsell, for Appellant.

W. U. Goodman, for Respondent.

HART, J.—This is an appeal by the defendant from the judgment on the judgment-roll alone.

By the filing of a verified complaint, the plaintiff brought the action to recover from the defendant judgment for the sum of \$609, alleged to be due the former from the latter by reason of a transaction which is stated in the complaint as it was originally filed as follows:

"That on or about the 1st day of December, 1913, plaintiff sold to said defendant fifty-three tons of hay at twelve dollars per ton, amounting to six hundred and nine dollars; that said defendant promised to pay said plaintiff the said amount as follows: One-half thereof to be paid on the 1st day of January, 1914, and one-half on the last day of January, 1914."

It is then alleged that the defendant "failed and neglected to pay said amount at said times, and that the said amount, and the whole thereof, still remains due, owing, and unpaid."

The defendant demurred to the complaint on both general and special grounds. The special grounds of demurrer are that the complaint is uncertain, ambiguous, and unintelligible because it does not appear therein, nor can it be told there-

from, whether the defendant was required to pay for the hay before or after delivery, or whether the hay has been delivered to the defendant, etc.

The demurrer was overruled, and thereafter, in due time, the defendant filed an unverified answer or a general denial to the complaint.

The judgment recites that the defendant was not represented at the trial, but it is stipulated that, during the course of the trial (evidence having been taken), the plaintiff was permitted by the court to add to the charging part of the complaint, above quoted, the words, "and delivered," inserting said words therein immediately after and following the word, "sold." By the addition so made, the complaint was made to read: "That on or about the 1st day of December, 1913, the plaintiff sold *and delivered* to said defendant" the hay, etc.

A copy of the complaint as so altered or of the language added thereto as indicated was not served on the defendant or its counsel.

The position of the defendant is that the action was intended as one for goods sold and delivered, but that the complaint failed to state such a cause of action because it omitted to allege that the goods alleged to have been sold had been delivered, and that, therefore, the demurrer should have been sustained. It is further contended that the alteration made in the complaint at the trial by inserting therein the words, "and delivered," so that a cause of action for goods sold and delivered was stated, constituted an amendment of that pleading, and that, therefore, it was, under the terms of section 432 of the Code of Civil Procedure, entitled to be served with a copy of such amendment or the complaint as amended, thus giving it the opportunity to which it is entitled by virtue of said section to exercise its right to answer or demur to the amendment or the complaint as amended within the ten days allowed thereby.

We can see no reason for doubting that the complaint, in its original draft, stated a cause of action on a contract of sale.

A "sale" is defined by our code to be "a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." (Civ. Code, sec. 1721; 35 Cyc. 25.) In other words, a sale is a transfer of the title to a thing from one to another for a consideration. Thus it is plain

that a contract of sale and the title to personal property thereby transferred may be consummated without a delivery of the property to the vendee, the rule requiring the possession of such property to be delivered to the vendee to render the sale valid as against the creditors of the vendors being one of evidence only, and in no way enters into the contract of sale as an element thereof, so far as the parties thereto are themselves concerned. It is hence very clear that the complaint, in its original draft, having alleged that the plaintiff sold the hay to the defendant, that the latter promised to pay for the same in two installments on specified dates, and that it defaulted in its promise so to pay, at the least stated a cause of action on the contract of sale so pleaded, and that, therefore, the demurrer was properly overruled.

The complaint having been verified, it was necessary for the defendant, to have stated a defense to the cause of action set up in the complaint, to have filed a verified answer. (Code Civ. Proc., sec. 446.) This it failed to do, having, as seen, merely filed an unverified answer, and the "answer" so filed constituted no defense to the cause of action pleaded by the plaintiff. The plaintiff was, therefore, entitled to have the answer stricken out on motion and a judgment by default thereupon entered, or, in the absence of an order striking the answer out, to a "judgment for want of an answer." (*McCullough v. Clark*, 41 Cal. 298; *Hemme v. Hays*, 55 Cal. 337; *Hearst v. Hart*, 128 Cal. 327, 328, [60 Pac. 846].) Thus it is to be observed that the plaintiff, under his complaint as it was originally filed, was entitled to and properly awarded judgment for the sum for which he sued, and that by the alleged amendment of his complaint as indicated he could have obtained judgment for neither more nor less, nor, indeed, have obtained any different relief from that originally prayed for, and which he finally received. In other words, he was admittedly entitled to judgment for the amount sued for on the *contract of sale*, whether the goods were or were not delivered. We cannot, therefore, perceive wherein the defendant could derive any benefit from a decision returning the cause to the court below for further proceedings, assuming that the alteration of the complaint in the respect shown may truly be said to have resulted in changing the cause of action, or amounted to an amendment of the pleading in a material particular. Indeed, we are of the opinion that, in view of the

peculiar state of the record in this cause, the appeal here should be considered and decided under the light and according to the spirit and intent of the recent amendment of section 4½ of article VI of the constitution, for we cannot say that the order allowing the purported amendment of the complaint has resulted in a miscarriage of justice.

But we may, we think, safely take another view of the question presented.

While it would, of course, always be the better practice and responsive to the rules of good pleading, in an action for goods sold and delivered, to specifically and directly allege the fact of delivery as well as the fact of sale, we cannot bring ourselves to the belief that the fact of delivery is not necessarily implied from the averment that the hay was sold to the defendant, and, therefore, we think the complaint in this case, as it was originally drafted and filed, sufficiently stated a cause of action for goods sold and delivered.

A word or a phrase should be interpreted according to the connection in which it is used and the general purpose for which it is employed in particular instances. While in a contract of sale the phrase, "goods sold," might not necessarily imply that the goods had been delivered, it seems to us that delivery would necessarily be implied therefrom where the phrase is used in a pleading in an action to recover the price for which the goods were sold. As used in common parlance, the phrase, "goods sold," would be understood as goods sold and delivered to the buyer. And it is difficult to conceive a statement in a pleading, in an action to recover the price or consideration, that goods had been sold without, at the same time and as a part of the same concrete thought, conceiving the fact of the delivery of the possession of the chattel to the vendee, in whom the title thereto had been vested *eo instanti* upon the consummation of the sale. So, we are of the opinion that the allegation in *the complaint* that the plaintiff sold the hay to the defendant necessarily carried with it the implication that he delivered it to the defendant, and that this is sufficient as against the attack against the complaint upon any of the grounds set out in the demurrer. From this it would follow that the insertion of the words, "and delivered," in the complaint as above explained was unnecessary, and did not have the effect of adding anything to the complaint or changing the cause of action already pleaded.

Most assuredly, as counsel for the defendant maintain, under the old common-law system of pleading, as we find it expounded by Mr. Chitty and Mr. Stephens and other eminent juristic writers, the construction to which we feel justified in subjecting the complaint here would not be permissible. Under the common law, there were two different actions growing out of the sale of personal property, to wit: 1. An action for goods *bargained and sold*, where the goods had been sold but not delivered, and there had been a complete sale and the property in the commodity sold had become vested in the defendant, there having been an actual acceptance of the same by him; 2. An action for goods *sold and delivered*, in which case it was requisite to directly allege the delivery as well as the sale of the article. That system of pleading and procedure, however, required a literal observance of its rules, and the slightest technical departure therefrom, either as to the form of the action or the pleading of the facts essential to the statement of a cause of action in a particular form, would leave the party without a standing in court. Form was, in other words, held paramount to substance under that system of pleading, procedure, and practice—so much so, indeed, that that notion finally became responsible for the development of the more liberal ideas which directly forced the invention of the more elastic legal actions of case and *assumpsit*, and, indeed, the body of equitable remedies which now adorn the jurisprudence of all civilized countries.

But, under the reformed procedure, substance is no longer subordinated to form, and, under that system (in this state), there is but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs. (Code Civ. Proc., sec. 307.) And, as to the viewpoint from which pleadings shall be considered, the rule is that, in their construction, for the purpose of determining their effect, their allegations must be liberally construed, with a view to substantial justice. (Code Civ. Proc., sec. 452.) Therefore, where, under the old common-law system, a pleading would crumble under the weight of a demurrer, under the advanced or reform system, which concerns itself more with substance, the same pleading might reasonably and justly be held sufficient to state a cause of action for the particular relief prayed for. So, measuring the scope of the complaint in this action by our own rules of

pleading, we do not hesitate to say, as we have already declared, that from the averment that the plaintiff *sold* the hay to the defendant, the fact of delivery is implied, and this, while not the strictly proper manner of stating a case for goods sold and delivered, is nevertheless sufficient.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 26, 1916, and the following opinion then rendered thereon:

ANGELLOTTI, C. J.—The application for a hearing of this cause in this court, after decision by the district court of appeal of the third district, is denied.

In denying such application we deem it proper to say that the appeal was properly disposed of by the district court of appeal on the first ground stated in the opinion. What was said in support of a second ground for affirmance, commencing with "But we may, we think, safely take another view of the question presented," is not at all essential to the maintenance of the judgment of the district court of appeal, and while not intimating any view as to the correctness thereof, we do not desire to be understood by our denial of the application as approving the same. The appeal in this case was manifestly destitute of merit, and the district court of appeal would have been well warranted in penalizing appellant by the imposition of damages for a frivolous appeal, taken purely for delay, as asked by respondent's counsel in his brief.

Henshaw, J., Lawlor, J., and Melvin, J., concurred.

[Civ. No. 1413. Third Appellate District.—November 29, 1915.]

J. R. TERRY, Appellant, v. RIVERGARDEN FARMS COMPANY (a Corporation), et al., Respondents.

PLACE OF TRIAL—RESCISSION OF CONTRACT OF SALE OF REAL PROPERTY—

FRAUD—RECOVERY OF MONEY PAID.—An action to rescind a contract for the sale of real property and to recover the money paid thereunder on the ground of fraud is not an action for the determination of some right or interest in real estate within the meaning of section 392 of the Code of Civil Procedure, and is properly transferred to the county of the residence of the defendant upon motion therefor duly made.

ID.—NATURE OF ACTION—RELIEF UPON DEFAULT.—The nature of an action is to be determined from the allegations of the complaint and the character of the judgment which might be rendered upon default.

ID.—JOINDER OF REAL AND PERSONAL ACTION—VENUE.—When a real and personal action are joined, the case may be transferred to the residence of the defendant.

ID.—ACTION TO RESCIND CONTRACT OF SALE—MONEY JUDGMENT AGAINST CODEFENDANT—VENUE.—An action to rescind a contract of sale of real estate and to recover the money paid thereunder brought against two defendants, one of whom was not a party to the contract and only liable to a money judgment, is properly transferred to the county of the residence of such defendant.

APPEAL from an order of the Superior Court of Yolo County changing the place of trial of an action. **W. A. Anderson, Judge.**

The facts are stated in the opinion of the court.

A. G. Bailey, for Appellant.

Arthur C. Huston, and Harry L. Huston, for Respondents.

BURNETT, J.—This appeal is from an order of the superior court of Yolo County granting a motion for a change of venue to the city and county of San Francisco. Appellant's attack upon the order is based upon the assumption that the action is for the determination of some right or interest in real estate within the meaning of section 392 of the Code of Civil Procedure.

Manifestly, the nature of the case is determined from the allegations of the complaint and the character of the judgment which might be rendered upon default. (*McFarland v. Martin*, 144 Cal. 771, [78 Pac. 239].)

It appears from the complaint that the action is one of rescission based upon the ground of fraud. Attached to the complaint is a copy of a contract entered into between the defendant Rivergarden Farms Company and the plaintiff Terry. It seems that Stine & Kendrick, the other defendant, executed the said contract as attorney in fact for their co-defendant. The contract is in the usual form for the sale and purchase of real estate.

The complaint sets forth that certain false and fraudulent representations as to the character and condition of the land were made by the defendants, and it concludes with this prayer: "That the said contract of sale, between plaintiff and defendants for the purchase and sale of said farms Nos. 603 and 604 aforesaid, be canceled and declared to be not binding on this plaintiff; that it be adjudged that defendants repay plaintiff the sum of \$2,172.12 cash gold coin of the United States with interest thereon from the said month of November, 1913, at the legal rate; that plaintiff have his costs herein accrued and for such other relief as may be proper and equitable in this cause."

As is apparent, the specific relief prayed for is the cancellation of the contract and a money judgment against the defendants. It is equally apparent that the main relief is the recovery of the sum of \$2,171.12 in money, the cancellation of the contract being merely incidental to that consideration. No lien is claimed upon any property, nor is any right or interest in real property sought to be adjudicated. Manifestly, the judgment will not in any way affect the title to real property. To constitute a real action it must, of course, appear that title or interest in real property is involved. (*Clark v. Brown*, 83 Cal. 184, [23 Pac. 289]; *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, [133 Pac. 978].) Moreover, if we should admit that the action does concern real property in the sense of said section 392 of the Code of Civil Procedure, it is entirely clear that to the extent at least of said money judgment demanded it is a personal action, and when a real and personal action are joined, the case may be transferred to the residence of the defendant.



(*Smith v. Smith*, 88 Cal. 572, [26 Pac. 356]; *Warner v. Warner*, 100 Cal. 11, [34 Pac. 523]; *Donohoe v. Rogers*, 168 Cal. 700, [144 Pac. 958].) In the last of these it is said: "The language that we have quoted from section 392 of the Code of Civil Procedure is very broad, and there can be no question as to its including an action to declare a trust in real estate, where land is the exclusive subject matter of the litigation. (See *Booker v. Aitken*, 140 Cal. 471, [74 Pac. 11]; *McFarland v. Martin*, 144 Cal. 771 [78 Pac. 239].) The cases cited by defendants in this regard are all cases in which real and personal actions were joined, and it is well settled that a plaintiff cannot deprive a defendant of his right to a trial of a personal action in the county of his residence, by uniting in his complaint a cause of action for the recovery of or determination of an interest in real property."

The cases cited by appellant are easily distinguished, as is made apparent by a brief recital of the important facts therein.

Sloss v. De Toro, 77 Cal. 129, [19 Pac. 233], was an action in which a decree revesting the title was sought. The cancellation of a fraudulent sale was demanded and the reinvestment of the title to the land in plaintiff.

In *Franklin v. Dutton*, 79 Cal. 605, [21 Pac. 964], the plaintiff prayed for a reformation of a written contract of sale, and it was decided that the action was "for the determination of a right or interest in real estate." There is a palpable difference between an action to reform a contract of sale of real estate and thus continue it in operation as a claim against the property, and where such relief is the only judgment sought, and an action like this to rescind such contract and to recover back the consideration paid.

In *Herd v. Tuohy*, 133 Cal. 55, [65 Pac. 139], it was not decided whether the action was a real action, it being declared by the supreme court: "An action to set aside a deficiency judgment improperly rendered in another county in a foreclosure suit upon *ex parte* application, after the right thereto had been lost by the decree, is within the equity jurisdiction of the superior court of the county in which the improper deficiency judgment was levied upon the land of the plaintiff. If such action is a real action, under section 392 of the Code of Civil Procedure, it is brought in the proper county, and if not, the jurisdiction of the court is not affected by the

right of the defendant to change the place of trial, and if he fails to demand the transfer, he waives objection to the venue."

The local nature of the action of *Grocers' etc. Union v. Kern etc. Co.*, 150 Cal. 466, [89 Pac. 120], is clearly set forth in this quotation: "An action by a purchaser for a specific performance of a contract for the sale of land, and to compel a conveyance under an allegation that the purchase price has been paid, pursuant to agreement, from the proceeds of sales of fruits and lands made by defendant, for which proceeds an accounting is sought, with judgment for a surplus alleged, is in its nature an action to determine a right or interest in real property under subdivision 1 of section 392 of the Code of Civil Procedure, which, wherever commenced, must be tried, upon demand by the defendant, in the county where the land is situated. The accounting of profits to determine payment of the purchase money and to obtain judgment for any surplus is merely incidental to the real cause of action and relief sought, and does not change the nature of the action."

Hannah v. Canty, 1 Cal. App. 225, [81 Pac. 1035], had for "its sole object to establish and enforce a trust in land," and, of course, was a local action.

Robinson v. Williams, 12 Cal. App. 515, [107 Pac. 705], was "an action to cancel a contract of purchase for nonpayment as provided, and to declare the payments made to belong to the plaintiff, and to have it determined that defendant has no right, title, or interest in and to any of the lands and premises described in the contract, and that plaintiff is the owner and entitled to the possession thereof," and was therefore correctly held to involve the determination of a right or interest in real property.

Bartley v. Fraser, 16 Cal. App. 560, [117 Pac. 683], did not call for a determination of the question whether the action was local or personal, since, as the court said, "in either event it was properly transferred to Mariposa county for trial."

There is this further to be said that, as far as the action against Stine & Kendrick is concerned, it is clearly one for a money judgment in consequence of fraudulent representations. They were not a party to the contract of sale, and the

action against them is not remotely connected with any interest in real property.

Assuming, then, for the sake of argument, that the action against the other defendant involves an interest in real estate, the plaintiff cannot thereby deprive Stine & Kendrick of their right to a trial of a personal action in the county of their residence. (*Griffin & S. Co. v. Magnolia & H. F. C. Co.*, 107 Cal. 378, [40 Pac. 495].) And the fact is that the change of the place of trial was made upon the motion of said Stine & Kendrick and to the place of their residence.

For additional authority we may cite *Samuel v. Allen*, 98 Cal. 406, [33 Pac. 273]; *Gallup et al. v. Sacramento & San Joaquin Drainage Dist.*, 171 Cal. 71, [151 Pac. 1142]; *Anaheim O. F. Hall Assn. v. Mitchell*, 6 Cal. App. 431, [92 Pac. 331].

We think the order was correctly made, and it is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1422. Third Appellate District.—November 29, 1915.]

C. K. RAGAN, Appellant, v. CHASE S. RAGAN,
Respondent.

DEED—DELIVERY TO THIRD PARTY—VESTING OF TITLE—ESSENTIALS.—

It is absolutely essential to the validity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee beyond any power in the grantor to recall or revoke it.

ID.—QUIETING TITLE—DELIVERY OF DEED—FINDING SUPPORTED BY EVIDENCE.—In this action to quiet title, wherein the real question at issue was whether or not the deed under which the defendant claimed title was ever in fact delivered by plaintiff's intestate, it is held that the evidence is sufficient to support the finding that the grantor, about three weeks before his death, delivered the deed to the grantee with the intention that the title should vest absolutely in the latter, regardless of whatever doubt may be entertained as to the sufficiency of the first manual tradition of the deed to constitute a legal delivery.

1d.—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND—VALUABLE CONSIDERATION—CONSENT OF WIFE NOT NECESSARY.—The husband has the right to make a conveyance of the community property without the consent of his wife, where it is made upon a valuable and adequate consideration.

APPEAL from a judgment of the Superior Court of Kings County, and order denying a new trial. W. B. Wallace, Judge presiding.

The facts are stated in the opinion of the court.

H. Scott Jacobs, for Appellant.

John G. Covert, for Respondent.

BURNETT, J.—Plaintiff is the son and defendant a brother of one C. K. Ragan. Shortly after the birth of plaintiff his mother obtained a divorce from his father and the latter remarried in the year 1877. The father had no children by his second marriage, and he died intestate, on May 27, 1910, in the county of Kings, this state, leaving as his only heirs his widow, Mary E. Ragan, and plaintiff.

The complaint alleges that C. K. Ragan and his wife, after the year 1891, and prior to the 21st of November, 1906, acquired certain community property, including the land in controversy in this action, consisting of eighty acres of the value of eight thousand dollars; that, on the twenty-first day of November, 1906, C. K. Ragan signed an instrument purporting to be a deed conveying to the defendant said eighty acres of land. It is alleged, on information and belief, that said deed was never delivered; that there was no consideration for it, that it was in the nature of a gift, and was signed without the consent of the wife of said C. K. Ragan and with the intention on his part to defraud his wife and his son of their rights in the property. The complaint further alleged that plaintiff has been the owner of an undivided one-half interest in this real property since said twenty-seventh day of May, 1910. The prayer was for a decree quieting plaintiff's said title and canceling said pretended deed. The answer put in issue the material allegations of the complaint, and the findings and judgment were in favor of defendant.

In his reply brief appellant declares: "It will be noticed from an inspection of these specifications (in the bill of

exceptions) that the real question at issue was whether or not the deed under which defendant claims title was ever in fact delivered by plaintiff's intestate, C. K. Ragan. Plaintiff also specifies certain errors of law occurring at the trial and excepted to by him, consisting largely of rulings of the court in the admission of testimony."

As to the sufficiency of the evidence to support the finding of delivery, we can perceive no possible doubt. The law is, of course, as quoted by appellant from *Hayden v. Collins*, 1 Cal. App. 263, [81 Pac. 1120]: "But it is absolutely essential to the validity and effectiveness of a deed in escrow, that it be delivered to a third person for the grantee beyond any power in the grantor to recall or revoke it. The grantor must clearly and unequivocally evidence an intent and purpose to part with the possession and control of the deed for all time. In short, the delivery and transfer must be irrevocable." The question of escrow, however, need not be considered, as there is a sufficient showing to support the finding that "said deed was thereafter, to wit, on or about the 25th or 26th of April, 1910, duly and regularly delivered by said C. K. Ragan to said defendant Chase S. Ragan at the home of said Chase S. Ragan."

Witness Charles Tomer testified: "I visited C. K. Ragan frequently during his illness and talked with him about various matters. I remember a conversation with him about two weeks before his death; I remember the substance of what was said at that time about a deed to Chase S. Ragan of that land. Mrs. Chase Ragan was present. I can state the substance of the conversation. He said he had sold Chase Ragan that place; and he had paid for it and he had given him a deed."

Defendant testified: "I bought the ranch and was to pay for it yearly. The agreement was oral. C. K. Ragan said that I could have this piece of land if I would pay him at the rate of eight per cent interest a year as long as he lived, providing he didn't live over ten years, if I would pay him three hundred and twenty dollars a year, and I spoke about not having the money then, and he said he would let me have five hundred dollars the same as he did the ranch if I would pay him eight per cent on it, so I bought in under those conditions. . . . I told him I would take the ranch under those conditions and I took possession of the ranch; I don't know

just exactly the day of the month but it was in 1906; I came here to town and of course we talked it over and we had made the bargain for the ranch. . . . He handed me this deed; he says, 'Here, Chase, is the deed to your piece of land out there,' and he says, 'You take it and look at it and see that it is all right,' so I says, 'I don't know whether it is right or not,' and if my memory serves me right I took the deed over to Frank Hight and I think that Frank Hight found some little mistake in the deed and corrected it, and I took it back and gave it to C. K. Ragan and asked him what he was going to do with it; he said he was going to put it in escrow; I didn't pay any attention to it; . . . I took him out to my house and looked after him; . . . he said if he died before the payments were made I was to have my deed and the place was paid for." The witness further stated that he took possession of the land in pursuance of his agreement with C. K. Ragan, and, furthermore, that he put improvements upon the land of the value of two thousand five hundred dollars, and that, two or three weeks before his brother died, "my wife and me was sitting by his cot; he was quite sick and he had that little tin box and was looking over his papers, and we sat there and he come to that deed and he handed it to me and he says: 'Chase, here is the deed to your place and I told Judge Ferguson to take this deed in and have it recorded with the rest of them,' . . . and I saw him a day or two later and paid him for recording the deed." There is other corroborative testimony, but from the foregoing it is certainly a rational conclusion that, about three weeks before he died, the grantor delivered to said grantee the deed with the intention that the title should vest absolutely in the latter, whatever doubt may be entertained as to the sufficiency of the first manual tradition of the deed to constitute a legal delivery.

Of the contention that decedent had executed a prior deed of the same premises to Ida M. Ragan, the wife of defendant, and therefore had no title to convey to respondent, it is sufficient to say that there is sufficient evidence to support the theory that said deed was never delivered, and, if delivered, that it was subsequent to the delivery of said deed to respondent. It is hardly necessary to add that we must be controlled by the evidence favorable to respondent's contention rather than that which seems to support appellant's view. Extended consideration is devoted in the briefs to the ques-

tion of the credibility of the evidence in support of the findings, but it is not of moment here since we discern no inherent improbability therein.

The second point made by appellant is that the deed to respondent was and is void because in contravention of that portion of section 172 of the Civil Code providing that the husband "cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto." There would seem to be force in the contention of respondent that this provision was enacted for the sole benefit of the wife, and that no other person could or would have a right to complain of its violation, and that since she was not a party to the action or directly or indirectly interested therein, the objection cannot be considered. However, the soundness of this view need not be asserted, as there is an answer to appellant's contention that cannot be gainsaid. The court found on sufficient evidence that the husband conveyed the property not only for a *valuable* but for an *adequate* consideration. This unquestionably he had a right to do, under said section 172, without the consent of his wife. The evidence in support of this finding is set forth in the brief of respondent and need not be repeated here. The court being of the opinion—and that opinion being legally supported—that the husband had conveyed the property for a valuable consideration, it was, of course, not erroneous to sustain an objection to the offer to show that the wife's consent to the transfer was not obtained. This consideration, as well as the question whether said land was community property, was rendered immaterial by the finding and evidence already mentioned as to the sale for a valuable consideration.

An objection as calling for the conclusion of the witness was made by appellant to this question asked of defendant: "Well, what is your estimate of the amount of money you paid, Mr. Ragan?" The context, however, shows that counsel was calling for the best recollection of the witness and the question was so understood. He had stated that he had no memorandum of the amount he had paid and he could not state it exactly, but he had it in his mind. The evidence was somewhat uncertain, but we think it was admissible for what it was worth.

We can see no error in sustaining an objection to the following question asked of Mrs. Ragan: "And you thought it would be better to record the Chase S. Ragan deed?" What she thought in reference to it was of no consequence, and, besides, it was quite apparent from her conduct that she did think it was "better" to record that deed. It may be said, also, that she substantially answered the question subsequently.

Two other alleged errors in ruling upon the admissibility of evidence are suggested, but they seem so inconsequential as not to merit specific attention. Indeed, in view of the theory of the case adopted by the trial court, it could not be held that any or all of the rulings upon the admission of evidence, if technically erroneous, resulted in any prejudice.

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1773. Second Appellate District.—November 29, 1915.]

EMILY S. PERKINS, Appellant, v. GREGORY PERKINS,
Jr., Respondent.

DIVORCE—DEFAULT—FINDINGS—CONSTRUCTION OF SECTION 131, CIVIL CODE.—Under the provision of section 131 of the Civil Code, requiring that in actions for divorce the court must file its decision and conclusions of law "as in other cases," the quoted words refer to the form of the findings, and are not to be taken as intended to relieve the trial judge in cases where default has been entered in a divorce action against one of the parties from making his decision in writing.

ID.—DEFAULT—ISSUES.—In view of the code provision that no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, there are issues to be tried in actions where the adverse party has suffered default, as well as in cases where answers are filed.

ID.—EXTREME CRUELTY—GRIEVOUS MENTAL SUFFERING.—In order to constitute extreme cruelty of the character of grievous mental suffering, it is no longer necessary, as announced in the earlier decisions, that a perceptible effect of such suffering should be produced upon the body or health of the complaining party, but the rule is that whether in any given case there has been inflicted "grievous mental

suffering" is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.

ID.—EVIDENCE—DISAGREEABLE CONDUCT OF DEFENDANT—UNWARRANTED RESTRICTION OF PLAINTIFF'S EXAMINATION.—In an action for divorce on the ground of extreme cruelty, it is prejudicial error to refuse to permit the plaintiff, while being examined by her own counsel, to testify as to the acts of the defendant at the times he would intrude himself upon her privacy, on the ground that the witness should not be embarrassed as to matters that could not be corroborated, and that such testimony would be of no value and disregarded by the court.

ID.—RIGHTS OF LITIGANTS—DUTY OF COURT.—In actions for divorce, the complaining party has the same right as any other litigant in any other class of actions, not only to the opportunity to present fully his or her case, but to every reasonable assistance of the court in the premises.

ID.—SUBJECT OF MENTAL CRUELTY—TESTIMONY OF PHYSICIANS.—In such an action, physicians of the plaintiff may testify generally as to the subject to which plaintiff ascribed her disturbance of mind and health when she consulted them, as corroborative of her claim that the same was due to marital difficulties.

ID.—CORROBORATION OF ACTS OF CRUELTY.—When the cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Hutton & Williams, Edwin A. Meserve, and Shirley E. Meserve, for Appellant.

No appearance for Respondent.

JAMES, J.—This is an appeal taken from a judgment denying the plaintiff a decree of divorce. The defendant suffered default, and the court heard testimony at great length, all of which is presented here by transcript of the reporter. The

ground alleged was extreme cruelty. As described in the complaint, the facts relied upon were those which it is asserted established a course of cruel conduct practiced by the defendant against the plaintiff, and which commenced within a few weeks after their marriage in June, 1911, and continued almost uninterruptedly for a year and a half, or until the plaintiff left the defendant. At the conclusion of the testimony the court orally summed up the case as being one of incompatibility of temperament, for which no divorce could be granted, and declared that the proof did not show extreme cruelty. No findings of fact were made. The only purported finding of any kind is the recitation found in the judgment as follows: "The court finds the evidence did not prove extreme cruelty and is insufficient to warrant a decree of divorce." This finding, if it was intended as a finding of fact, and if written findings are required to be made in divorce actions, was wholly insufficient. (*Franklin v. Franklin*, 140 Cal. 607, [74 Pac. 155].) One of the claims of appellant is that the judgment should be reversed, because it is unsupported by findings which, it is argued, are required to be made under the provisions of section 131, Civil Code. This contention presents for consideration the question as to whether in actions for divorce, where the adverse party has made default, the court is required to express its decision in the form of findings of fact. Section 632 of the Code of Civil Procedure requires the court generally, where a trial of a question of fact is had, to give its decision in writing. In the case of *Foley v. Foley*, 120 Cal. 33, [65 Am. St. Rep. 147, 52 Pac. 122], it was held that in a divorce case, where no answer was filed, there was presented no issue of fact, strictly speaking, to be determined by the court. And in *Waller v. Weston*, 125 Cal. 201, [57 Pac. 892], considering the requirement of section 632, Code of Civil Procedure, it was said: "It is contemplated by our law that findings of fact shall be made only upon issues joined by the pleadings under section 590 of the Code of Civil Procedure." At the time these decisions were rendered section 131 of the Civil Code did not contain the provision requiring the court to make its decision in divorce cases on the questions of fact in form as in other cases. That section in its first provision is as follows: "In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that

no divorce shall be granted, final judgment must thereupon be entered accordingly." In construing that portion of this section which declares that in divorce actions the decision and conclusions of law shall be filed "as in other cases," we are inclined to the view proposed by the appellant, which is that the words "as in other cases" refer to the form of the findings, and should not be taken as intended to relieve the trial judge in cases where default has been entered in a divorce case against one of the parties from making his decision in writing. This section coming as new legislation following the decision in the *Foley* case, we may, we think, properly indulge the presumption that the legislature intended to correct what it deemed to be a deficiency in the law. Moreover, it seems to us not to be correct to say that there are no issues to be tried in divorce actions, where default has been suffered by a defendant party, when the law requires strict proof to be made of a plaintiff's cause of action. (Civ. Code, sec. 130.)

In this view we are in strict accord with the reasoning of the court in the case of *Nelson v. Nelson*, 18 Cal. App. 602, [123 Pac. 1099], where the court, by Justice Burnett, said: "Ordinarily, there would be no 'trial of a question of fact' where the fact is admitted by the failure to deny it, but where the asserted fact is the ground upon which a party relies for divorce, it must be established as though denied, since 'no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties.' " The court in that decision takes notice of the provisions of section 131 of the Civil Code, and concludes that where a cross-complaint stands in an action for divorce without answer, the trial judge is not excused from making his decision in writing upon the issues of fact proposed therein. It is only fair that a party who has suffered an adverse decision at the hands of the court, based upon alleged insufficient proof, should have the benefit of a written declaration as to the particular conclusions arrived at by the court. This case most aptly illustrates the sound reason for such a requirement. For aught that appears from the judgment made by the court in this case, the trial judge may have considered that all of the facts alleged had been sufficiently proven and corroborated, but had determined from those facts that, as a legal conclusion, the acts complained of did not amount to extreme cruelty. If such was his conclu-

sion, it may be unhesitatingly said, upon the complete record of the testimony as it is presented, that such a determination is not borne out by the proof. The plaintiff here relied upon a course of conduct practiced by the defendant habitually, regularly, and almost continuously from a date a few weeks after the marriage, down to the day that she finally left him. This conduct, as alleged and testified to by her, consisted in acts which were calculated to irritate and humiliate the plaintiff and produce the exceedingly high state of nervous tension and distraction to which it was shown she had finally been driven. It will serve no useful purpose to recite the evidence with great detail. In the main, the facts were: The plaintiff, at the time of her marriage to the defendant, was a widow having two sons by a former marriage, to whom she was much attached and who were members of her household except at the times they were away at school and college; that defendant prior to his marriage represented that he had a business by which he earned about three hundred dollars per month; that plaintiff was possessed of a considerable amount of property and an income large enough to supply all the needs of herself and family; that knowing defendant had habitually supported an invalid mother, immediately upon her marriage with him, and in order to provide for the support of this mother during the time that plaintiff and her husband would be away on their wedding trip, she gave the defendant six thousand dollars for the use of his mother; that thereafter she proposed and was willing to allow him several hundred dollars per month for his personal use out of her own estate in return for very nominal services to be performed by him in connection with the management of her property; that she desired to and did retain direct charge of large property interests, and that from the beginning this attitude on her part to manage her own affairs seemed to exasperate the defendant; that he became moody and upon many occasions shown in the testimony would become sullen and cry and refuse to mingle with the household, although he persisted in remaining in the presence of the plaintiff practically all the time, both day and night; that so persistent was he in his personal attentions that plaintiff could not even visit her bathroom without his accompanying her; that upon one occasion he removed the lock from the bathroom door in order to prevent the plaintiff from denying him access to that room

while she was making use of it; that he would not allow her to telephone to her lady friends without being present and standing near the telephone, and at times, if anything was said which did not particularly please him, he would take the telephone away from the plaintiff and hang it up; that in the presence of her lady friends, and generally in the presence of guests, he would act in a moody, sullen, and insulting manner toward her; that upon one or more occasions he insisted upon her leaving the house at a very early hour in the morning to attend communion service when she was in a sick condition; when she desired to have a cup of coffee before starting, and when the servant offered her the coffee, he rudely seized her by the arm, forced her through the door, and compelled her to go with him in her weak condition without nourishment; that when he became displeased at anything, which was a frequent and constant occurrence, he would sulk and cry and stare at plaintiff, and when plaintiff would beg him to tell her what was the matter would make no response, and would sometimes continue in that attitude for three or four days, not once speaking to the plaintiff; that the defendant on various occasions accused the plaintiff of being untruthful and treated her in an uncivil and contemptuous manner, both in the presence of her friends and strangers and privately. This course of conduct was shown to have been quite the regular thing with the defendant. The evidence showed that plaintiff was naturally a nervous woman; that she had always dwelt in a peaceful and harmonious atmosphere and had been very happy in her family relations; that the conduct of the defendant so preyed upon her nervous organism that she became restless and sleepless, and when examined by her family physicians, after having lived with the defendant for some time, was found to be in such a condition of nervous unrest as to threaten her complete prostration. These physicians had known the plaintiff prior to her marriage and were able to testify that she had always been normal and, as one of them said, organically she was without disease. That the general course of conduct was as has been described, the plaintiff testified to fully, and in a general way all of the facts stated by her were corroborated by independent witnesses. While we think that the judgment in this case must necessarily be reversed for lack of any findings of fact, we have deemed it advisable to consider the evidence as though

the law did not require such findings in default divorce cases. We do this more particularly because the question of the sufficiency of the evidence is argued in the very able brief presented by counsel for appellant, as well as certain alleged errors which the court committed in the course of the trial. To a proper end, too, this discussion may be of benefit to the trial court upon a rehearing of this matter in the event that any such is had. We may fairly surmise from the oral remarks made by the trial judge, which of course have no formal potency as indicating what his findings of fact might have been, that he did not consider that the evidence, assuming the whole truth of it and assuming sufficient corroboration, as there was, showed a case of extreme cruelty within the meaning of the definition given by the Civil Code. In the earlier decisions of our supreme court, in consonance with the ancient rule, it was in effect announced that there could be no extreme cruelty as a result of mental irritation until a perceptible effect had been produced upon the body or health of the complaining party. In the case of *Waldron v. Waldron*, 85 Cal. 251, [9 L. R. A. 487, 24 Pac. 649], the court, in a majority opinion, said: "Although the character of the ill treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of its sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party." This was what might be called "the rule of the Puritans," and it is a cause for gratification to know that our law as it has since been established proposes no such extreme and harsh definition for extreme cruelty as it may furnish ground entitling a party to a divorce. In the *Waldron* case, Justice McFarland, dissenting, sounded the note which resulted in a later modification of the rule announced in that decision. His words of protest may well be remembered, when he said: "This doctrine makes legal cruelty depend, not on the misconduct of the husband, but on the endurance of the wife; not on the guilt of the wrongdoer, but on the vitality of the victim. The anguish of the mind must have eaten through the flesh and exhibited itself in bodily disease before there can be any legal evidence of cruelty. But some women, like some men, have inherited from sturdy an-

cestors physical constitutions so robust, with bone and blood, and muscle and nerve, and heart and lungs, so charged with vitality, that the woes of a Lear would not wear out the machinery or obstruct the currents of healthy physical life. Must such a woman suffer on forever, and only the weak who faint at a gentle reproach be relieved?" Our supreme court receded from the conclusions of the rule asserted in the Waldron case when it considered the case of *Barnes v. Barnes*, 95 Cal. 171, [16 L. R. A. 660, 30 Pac. 298]. In the opinion there it was said: "The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made. Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party." We cannot imagine from the proof made in this case that the trial judge was impressed with the view that the plaintiff was not a woman of great refinement of sensibility, intelligent, and cultured, for the evidence tends to show nothing else. Even where the judge, prompted evidently by personal acquaintance with the parties, sought to show that the plaintiff had always been of a nervous temperament, the answers given in the affirmative would tend to add to rather than detract from the strength of the plaintiff's proof, in that they assisted to show that she was of such a temperament as would be more easily and deeply affected by the reprehensible conduct of the husband. In fact, upon all of the material issues presented by the complaint, there is nothing in the record which suggests a case which might be termed one of conflicting evidence. During the progress of the trial, counsel for the plaintiff, apparently to prove with exactness the disagreeable conduct of the defendant, asked the plaintiff while on the witness-stand to describe exactly the acts of the defendant at the times when he would intrude himself upon her privacy, and the court interrupted and told counsel that he ought not to embarrass the witness in regard to matters that could not be corroborated, saying: "I don't pay any attention to those things." Counsel suggested, and very correctly, that all of

the matters offered in proof in a divorce action did not need corroboration, but the court did not recede from the attitude expressed in the statement referred to, and counsel then desisted from further examination along that line. We think that the action of the court in this regard placed an improper restriction upon the plaintiff in the conduct of her case. As a litigant before the court she was entitled to offer and have received all competent legal testimony, and it was not for the court to prejudice the effect of this testimony and to announce or suggest in advance that that testimony, taken in connection with all of the proof made in the case, would be of no value, and would be disregarded by him. The plaintiff as a witness was being examined by her own counsel. She was "in the hands of her friends"; hence, why this extreme solicitude on the part of the court lest her own attorney should embarrass her by requiring intimate disclosures to be made? She was there under the necessity of making such intimate disclosures in order to apprise the court fully of the discomfort of the position she had occupied with the defendant and of the degree to which her mental sensibilities had been preyed upon. We agree very completely with the statement made in the brief of counsel that trial judges have not the duty in divorce cases to do anything except to see that the law is strictly and fairly complied with. A suitor in a divorce action must, as a litigant, stand in as favorable a light before the law as the plaintiff in a suit on a promissory note. Our legislature has declared the policy of the law as it shall affect actions for divorce, and has provided that relief shall be granted to parties when certain grounds have been established. In the establishment of these grounds the complaining party has the same right as any other litigant in any other class of actions, not only to the opportunity to present fully his or her case, but to every reasonable assistance of the court to be lent in that direction. We think that the attitude of the trial judge in restricting counsel in his examination of the plaintiff as to the matter adverted to was error of a prejudicial kind. The case of *Pratt v. Pratt*, 141 Cal. 247, [74 Pac. 742], is in point. We think, too, that the court might properly have allowed the physicians of the plaintiff to testify generally as to the subject to which plaintiff ascribed her disturbance of mind and health when she consulted them. Not that it would have been proper to have admitted her statement in detail as to



any acts committed by the defendant, but merely as tending to show that her disturbed condition was due to marital difficulties. Such evidence is admitted as corroborative in its tendency, just as in criminal actions where the charge may be rape, it is allowed to be shown that the prosecutrix made complaint of the fact that she had been raped at a time reasonably near to that of the alleged occurrence. Such testimony may, in a general though perhaps not in a strict sense, be classed as part of the *res gestae*. It was not necessary that all of the matters alleged and testified to by the plaintiff should be supported by corroborative evidence. "Where the cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff. The main purpose of section 130 is to prevent collusion." (*Andrews v. Andrews*, 120 Cal. 186, [52 Pac. 298]; *Avery v. Avery*, 148 Cal. 242, [82 Pac. 967].)

Our conclusion is, not only that the judgment lacks the support of sufficient findings of fact, but that the evidence does not sustain the judgment denying a divorce, and that the court committed error as to its rulings on the admission of testimony which was prejudicial to the rights of the plaintiff.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1542. First Appellate District.—November 30, 1915.]

**JAMES B. JOHNSON, Respondent, v. JOHN HINKEL
et al., Appellants.**

CORPORATION LAW—STOCKHOLDERS' LIABILITY—STATUTE OF LIMITATIONS.

An action to enforce the liability of stockholders of a corporation is, under the provisions of section 859 of the Code of Civil Procedure, an action to enforce "a liability created by law," and is barred at the expiration of three years from the time when the liability was created, and not at the expiration of such period from the discovery of the facts creating such liability.

ID.—BREACH OF LEASE—LIABILITY OF STOCKHOLDERS—TIME OF CREATION—STATUTE OF LIMITATIONS.—In an action to recover damages upon a stockholder's liability for breach of the terms of a lease of land made by the corporation, the statute of limitations runs from the time of breach, and not from the time of the execution of the lease.

ID.—BREACH OF LEASE OF OIL LANDS—REMOVAL OF CASING FROM WELL—MEASURE OF DAMAGES.—In an action by a lessor against the stockholders of a corporation for damages for the wrongful removal by the corporation of a quantity of casing from an oil well drilled by it on the lands of the lessor, the correct measure of the plaintiff's damages is not the amount which it would cost to replace the well in the same condition it was in at the time of removal, but simply the value of the casing when removed from the well, where it is shown that the land was barren and desert land and valuable only if it contained oil, and that no oil had been discovered therein.

ID.—BREACH OF CONTRACT—MEASURE OF DAMAGE.—Courts will not, except where exemplary damages are given, allow a party to a contract to recover upon its breach more than he would have received by its due performance.

ID.—LEASE OF OIL LANDS—NONREMOVAL OF CASING UPON ABANDONMENT—COVENANT NOT VIOLATIVE OF ACT OF 1903.—A provision in a lease of land for the purpose of exploring for and developing oil thereon, that the lessee should not remove the casing therefrom or plug any wells without the written consent of the lessor, does not make the lease void as violative of the act to prevent injury to oil or petroleum bearing strata by the infiltration or intrusion of water therein (Stats. 1903, p. 399), and which requires that upon the abandonment of any oil well, it shall be the duty of the owner to withdraw the casing therefrom and fill up the well.

ID.—MAINTENANCE OF ACTION BY LESSOR—WITHDRAWAL OF LAND FROM ENTRY—PRIOR RIGHTS NOT AFFECTED BY.—The right of the lessor to maintain an action for damages against the lessee of oil lands for a breach of the terms of the lease is not affected by a Presidential proclamation withdrawing such lands from entry, where at

the time of breach the plaintiff was in lawful possession of the land as a locator under the mining laws of the United States.

ID.—JURISDICTION OF SUPERIOR COURT.—The superior court has no jurisdiction as to defendants in an action upon a stockholders' liability where the prayer for damages against them is for less than three hundred dollars.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

A. L. Weil, and Everts & Ewing, for Appellants.

Barbour & Cashin, and Short & Sutherland, for Respondent.

KERRIGAN, J.—This action was brought to recover damages in the sum of twenty-two thousand five hundred dollars upon a stockholder's liability against defendants, who were stockholders in the Lorene Oil Company, a corporation.

The damage claimed arose from the removal of a quantity of casing from a certain oil well which had been drilled by the Lorene Oil Company upon the plaintiff's land in the Coalinga oil fields, upon the abandonment by that company of said lands and of its operations thereon under a certain lease. The action was based upon a breach of the terms of the lease, which had been entered into by the parties thereto under the following circumstances: On the sixteenth day of March, 1907, the plaintiff entered into a lease with one Wilcox, with the object in view that the former's land should be explored for oil and developed. The agreement required Wilcox to drill a well to a depth of at least three thousand feet, unless oil should be discovered in quantities of twenty-five barrels of oil per day at a less depth. If oil was discovered, the lessee was to pay to the lessor one-eighth royalty, and he was also given an option to purchase the property for the sum of twenty thousand dollars. Shortly thereafter, and during the same year, Wilcox assigned his interest in this agreement to the Lorene Oil Company, which assumed all his obligations thereunder. The company drilled a well to a depth of 3,660 feet, being 660 feet deeper than was required by the contract, and,

not having made a discovery of oil, abandoned the property. The lease contained the following provision with reference to abandonment: "In the event oil is not found in paying quantities by the lessee on the land so leased after the compliance with the terms herein, and said lessee desires to abandon the enterprise and to be released from the terms hereof, he shall have the privilege of removing all engines, tanks and fixtures above ground which he may have placed on said land, but shall not remove the casing from any well or plug any wells thereon without the written consent of said lessor." Upon the abandonment of the property the company, contrary to this last mentioned provision, removed over ten thousand feet of casing without the written consent of the lessor, and the breach of the agreement in this respect gave rise to the present controversy.

Plaintiff recovered judgment against the defendants in the sum of twenty-two thousand five hundred dollars, and this is an appeal from such judgment and from an order denying defendants a new trial.

The defendants make the following points for a reversal of the judgment: (1st) That the action was barred by the statute of limitations; (2d) errors in the instructions and in the admission of testimony concerning the measure of damages; (3d) that the contract was illegal, and consequently no recovery could be had thereon; and (4th) that the court had no jurisdiction as to two of the defendants.

In support of the first contention it is the claim of the defendants that the action is barred by virtue of the provisions of section 359 of the Code of Civil Procedure. The action was commenced as to certain of the defendants on October 23, 1912, and additional defendants were added by an amended complaint filed March 27, 1913. It is argued that as it appears on the face of the complaint that the damages were sustained on November 1, 1909, the demurrer should have been sustained as to the parties joined as defendants under the amended complaint; and as to the other defendants, there being a conflict of testimony, that the question should have been left to the jury as to whether the damage was done on October 6, 1909, as testified to by defendants' witnesses, or on November 10th, as stated by the witnesses produced on behalf of the plaintiff. The amended complaint upon which the case went to trial alleged that the fact upon which liability was asserted was not discovered by plaintiff until November, 1910.

If the right of action accrued at this date, the statute does not operate as a shield to any of the defendants except as herein-after stated. It is insisted by defendants that an action against stockholders in this state is barred within three years from the time the liability is created, and the fact that discovery is not made of the liability within that time is of no consequence, the element of discovery not being a factor for consideration under the section. The trial court instructed the jury as follows: "I instruct you that if you find that the plaintiff commenced this action against defendants within three years after the discovery by him that the Lorene Oil Company had committed the acts complained of, and that plaintiff used reasonable diligence in the discovery of the fact that the acts complained of had been committed, and if you further find that the said acts of the Lorene Oil Company resulted in an injury for which plaintiff is entitled to damages, then each of the defendants is individually and personally liable. . . ." It is conceded that if counsel for the appellants is correct in his construction of section 359 of the Code of Civil Procedure, the trial court was in error in so instructing the jury, and that such error is sufficiently important to justify a reversal of the case.

Section 359 reads as follows: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created." In support of his contention that the proper construction of the statute is that such action must be brought within three years after the liability is created, and that it does not extend to three years after the discovery of the fact creating such liability, it is argued that neither grammatically nor logically does the section warrant the construction placed upon it by the trial court; and that the appellate courts of this state have never considered this doctrine of the discovery of facts applicable to stockholders' liability, and that the phrase "discovery by the aggrieved party" refers to the facts upon which a "penalty or forfeiture attached," and does not refer to the "liability created by law"; that it refers to illegal acts of directors for which they are liable to either a penalty

or forfeiture, and does not apply to the ordinary civil obligation created by law against the stockholders.

The element of discovery in actions of this character was recognized in *Moore v. Boyd*, 74 Cal. 167, [15 Pac. 670]; but in the later case of *Royal Trust Co. v. MacBean*, 168 Cal. 642, [144 Pac. 138], it would seem that this doctrine has been rejected, for it is there said that a fair reading of the section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture, and that in actions to enforce "a liability created by law," the period of limitation is three years from the creation of the liability. We conclude, therefore, that the court erred in giving the instruction complained of.

It is further contended with reference to the statute of limitations that the liability was created at the time of the execution of the lease and prior to the breach thereof by the Lorene Oil Company. In this behalf it is the claim of the defendants that this is the only logical construction to be drawn from the decisions of the supreme court; and it is argued that the Lorene Oil Company having assumed all obligations under the lease in 1907, the liability of the stockholders became fixed at that time, and the statute of limitations was immediately set in motion. In *Hunt v. Ward*, 99 Cal. 614, [37 Am. St. Rep. 87, 34 Pac. 335], it was held that whatever the character of liability might be, "it is created by the consummation of the contract, act, or omission by which the liability is incurred." The liability here claimed was not created at the time the lease was assigned to the corporation in 1907, but was so created by the act of the corporation in removing the casing from the well. Upon this question involving the statute of limitations, therefore, we conclude that the objection of the defendants is not well taken.

As stated by counsel for both parties, the important question to be determined in the case is the correct measure of damages for the breach of the contract in removing the casing from the well. Plaintiff and defendant have quite different theories upon this subject. It is the claim of plaintiff that the lessee not being permitted under the terms of the lease to remove any casing from the well without the written consent of the lessor, upon proof of such removal the only question of fact to be determined by the jury was the amount which it would cost to replace the well in the same condition

it was in at the time the Lorene Oil Company abandoned the premises and removed the casing. The theory of the defendants was and is that the land where the well was situated was barren, desert land, and valuable only if it contained oil; that the well itself was of value only in so far as it could be used to produce oil; that no attempt had been made by plaintiff to produce oil from the property since its abandonment and up to the time of the trial, a lapse of time of some four years; that there was no oil in the well, that the Lorene Oil Company had abandoned it after having expended from forty thousand dollars to sixty thousand dollars in development work; that neither the plaintiff nor anyone else had any wish, desire, or intent to produce any oil from the land or to use the well for that purpose, and that consequently the well was valueless, and the plaintiff suffered no damage no matter what was done to it. It is admitted that the Lorene Oil Company had removed some ten thousand feet of inner casing from the well but left the well cased from top to bottom. It is also conceded that it was a practical impossibility to take the casing that had been removed from the well and put it back so as to restore the well to its former condition, and that it was less costly and far more certain in results to drill an entirely new well than to attempt to replace the casing in the old one, and that a new well would cost anywhere from forty thousand dollars to sixty thousand dollars. The amount of damages claimed by plaintiff was twenty-two thousand five hundred dollars, a sum much less than the minimum amount which, according to the evidence, it would take to put the well in the same condition that it was in before the casing was removed from it.

The trial court adopted the plaintiff's theory, that the cost of replacement was the proper measure of damages, and instructed the jury to find an amount sufficient to put the well in the condition it was before the removal of the casing. The instruction given upon this point was as follows: "I instruct you that under the terms of the lease involved in this action the plaintiff, as lessor, was entitled to have any well drilled by the Lorene Oil Company on the premises described in the lease left in the condition as to the casing therein in which said well was at the time said Lorene Oil Company ceased drilling said well with the intention of abandoning the same; and in this connection I charge you that the plaintiff's right

to have said well so left was irrespective of the question whether oil had been discovered on said land, or whether there was reasonable ground to believe that oil would be discovered thereon. If, therefore, you find that the Lorene Oil Company did not leave the well drilled by it in the condition above described, then your verdict must be for the plaintiff in an amount sufficient to place said well in such condition, not exceeding, however, the sum of twenty-two thousand five hundred dollars." Under this instruction the jury was practically told to find for the full amount of damages prayed for, regardless of whether there was oil in the land or not, or whether the well was of any value at the time of the removal of the casing, and regardless of whether the well would have been of any value if restored, or whether the well as left could have been made thoroughly useful at a less cost. We are of the opinion that the instruction was erroneous.

The instruction was based on the theory of plaintiff that he was entitled to have the casing remain in the well for the reason that the lease so provided, and that this right was not dependent or based upon the use to which the lessor might thereafter put such well, or whether thereafter he ever used it at all; that it was enough for the corporation to know that it was "so nominated in the bond." It is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract, to recover upon its breach more than he would have received by its due performance. The Civil Code, in providing for the measure of damages in the case of a breach of contract, lays down the rule that a party is entitled to recover an amount which will compensate him for all the detriment proximately caused by the breach, or which in the ordinary course of events would be likely to result therefrom (Civ. Code, sec. 3300). In the early case of *De Costa v. Massachusetts etc. Min. Co.*, 17 Cal. 613, where the plaintiff had brought an action for damages for the digging of a ditch across a piece of land, the court below awarded sufficient damages to pay the expense of filling and restoring the land to its original condition; and the supreme court, in reversing the judgment, said: "In assessing the damages the court proceeded on an incorrect basis, and of course arrived at an erroneous result. The plaintiff could not recover beyond the injury sustained, and it was improper to award compensation for an expense which might never have

been incurred. It is possible that the cost of filling up the ditch may far exceed any injury resulting from its present condition; and in that case it is not probable that the amount would ever be used for the purpose." (See, also, *Harvey v. Sides Silver Min. Co.*, 1 Nev. 541, [90 Am. Dec. 510].) So here defendants sought to ascertain from plaintiff whether or not he ever intended to pursue development work for oil, but upon objection by his counsel his intention was kept from the jury. Under the instruction here given, irrespective of the testimony of defendants' witnesses, that the land in question was not oil land, and that therefore the leaving of the casing in the well according to the agreement would have availed plaintiff nothing, the jury was obliged to find the amount of damages claimed based on the cost of the well, although convinced that plaintiff would have gained nothing by a full performance of the contract except the value of the casing when removed from the well. Again, by reason of the instruction, the value of the casing was ignored, and by it the first cost was made the criterion irrespective of the fact that the well was useless. Defendants introduced evidence, upon which there was a conflict, to show that in order to make the well a producing one, it would be less troublesome and expensive to accomplish this purpose with the casing taken out of the well than if left in. By this instruction the latter question was eliminated from the consideration of the jury. This was a proper matter to be considered in the assessment of the damages suffered; as plaintiff is entitled to recover his pecuniary loss only. In our opinion, these and kindred questions are proper ones for consideration by court or jury in determining damages in cases of this kind. If the land upon which the well was situated was barren and desert land, and its only value was for its oil contents, and it could be proved that it contained no oil, then the only damage suffered by plaintiff would be the value of the casing when removed from the well. If, on the other hand, the land contained oil, and it was necessary that the casing should be left in the well for its further and proper operation, then the damage sustained would be an amount which would compensate plaintiff for all the injury or detriment caused by its removal or which might result therefrom, and no more. Here if oil had been discovered, the plaintiff would have been entitled to receive the sum of twenty thousand dollars as the purchase price of

the land had the Lorene Oil Company exercised the option given it. No oil was discovered; and under the theory of the measure of damages adopted by the trial court the plaintiff by the verdict obtains a judgment for twenty-two thousand five hundred dollars, even conceding the fact to be that the land contained no oil and was otherwise worthless. The law affords no such remedy.

Certain rulings of the court on the admission of testimony are claimed to be erroneous. These rulings in the main were based upon the court's theory of the measure of damages, and it is unnecessary to discuss them in view of what we have already stated upon that subject.

Defendants further contend that by reason of the fact that the complaint contains an allegation that the land in question is oil land, the provision in the contract that the lessee should not remove the casing therefrom or plug any wells without the written consent of the lessor makes the contract void upon its face, and that the demurrer to the complaint should have been sustained upon that ground. The basis of this contention is that such provision is violative of the act to prevent injury to oil or petroleum bearing strata by the infiltration or intrusion of water therein (Stats. 1903, p. 399), and which requires that upon the abandonment of any oil well it shall be the duty of the owner to withdraw the casing therefrom and fill up such well.

The statute was not designed to affect a case of this character. The lessor had the undoubted right to reserve unto himself the right to further prosecute the development of the land, irrespective of the fact that the lessee might conclude to abandon the lease for the reason that he was of the opinion that it was useless to further prosecute the work of exploration.

And, finally, defendants call the attention of the court to the proclamation of the President of the United States withdrawing from entry certain mineral lands, including the land here in question; and they claim that by reason thereof the plaintiff had no title to this land, and therefore has no cause of action. The proclamation referred to was issued July 2, 1910; the time of the entry of the Lorene Oil Company upon the land as lessee, and the time of the removal of the casing, were both prior to such proclamation. Whatever rights had accrued as between the parties were not affected by it. Moreover, it is a rule of law that a tenant is not permitted to deny

the title of his landlord. At the time of the breach of the covenant in the lease the plaintiff was in lawful possession of the land as a locator under the mining laws of the United States, and his right to the land as against everybody except the United States government was the same as though he held the land in fee (*Jennison v. Kirk*, 98 U. S. 453, [25 L. Ed. 240]). Then, too, the validity or invalidity of the proclamation is not a matter that could be litigated in this proceeding.

As to the defendants Katharine Brennan and E. H. Pauson, the prayer for damages against each of them is for less than three hundred dollars, and it is conceded that under the authority of *Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, [55 Pac. 689], the superior court had no jurisdiction as to them, and a dismissal of the case as far as they are concerned is consented to.

For the reasons given the judgment and order are reversed, with directions to dismiss the action as to Katharine Brennan and E. H. Pauson.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 28, 1916.

[Civ. No. 1580. First Appellate District.—December 1, 1915.]

WILLIAM GLINDEMANN, Respondent, v. WILLIAM EHRENPFORT, Appellant.

FRAUD—SALE OF CORPORATE STOCK—DAMAGES—UNWARRANTED JUDGMENT.—In an action to recover damages alleged to have been suffered by reason of certain false and fraudulent representations concerning the value of certain shares of corporate stock, and the interest or dividends that such stock paid, whereby the plaintiff was induced to purchase the same from the defendant, a judgment in favor of the plaintiff, who resold the stock the day following its purchase, cannot be sustained, where the amount of the same is based upon the difference between the value that the plaintiff and his purchaser determined the stock to be worth under a compromise agreement made between them six years after the occurrence of

the transaction, and the price paid to plaintiff by such purchaser for the stock.

ID.—MEASURE OF DAMAGES.—In such an action the measure of damages is the difference between the value of the stock at the time of its sale by the defendant to the plaintiff and what it was then actually worth.

ID.—EVIDENCE—VALUE OF STOCK—DIVIDENDS.—While the payment of dividends and the amount thereof are elements affecting the value of corporate stock, it by no means follows that such stock has no value because of the failure to pay dividends thereon.

ID.—PLEADING—DISCOVERY OF FRAUD—INSUFFICIENT COMPLAINT—STATUTE OF LIMITATIONS.—A complaint in an action for damages for fraud in the procurement of a sale of corporate stock, filed six years and four months after the alleged fraud, which contains no facts showing why the same was not sooner discovered, but which simply recites that the fraud was not known or discovered until about a certain date, is insufficient.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Adolphus E. Graupner, Judge.

The facts are stated in the opinion of the court.

Liess & Sweasey, for Appellant.

James M. Hanley, for Respondent.

LENNON, P. J.—This action was brought to recover damages alleged to have been suffered by plaintiff, William Glinde-mann, by reason of certain alleged false and fraudulent representations made by defendant concerning the value of certain shares of corporate stock, and the interest or dividends that such stock paid, whereby plaintiff was induced to purchase said stock from the defendant. The case was tried with a jury, which rendered a verdict in favor of the plaintiff for the sum of \$420, and this appeal is from the judgment rendered thereon and from the order denying the defendant a new trial.

It is insisted by the appellant that there is no evidence upon which the verdict and judgment can be sustained.

The facts leading up to the transaction, briefly stated, are these: In February, 1906, the defendant purchased ten shares of the capital stock of the Central Trust Company for the sum

of one thousand one hundred dollars. One month thereafter he received a semi-annual dividend of twenty-five dollars from profits earned by the stock prior to his purchase, the rate of dividend being approximately five per cent per annum. Shortly thereafter the fire of 1906 occurred in the city and county of San Francisco, causing a suspension of the dividends upon the stock. On January 3, 1907, ten months after defendant had received the dividends referred to, he sold said ten shares of stock to the plaintiff herein for the sum of one thousand one hundred dollars, said sum being the exact amount that defendant had paid for the stock eleven months previously. The following day plaintiff resold the stock to his sister-in-law, a Mrs. Schweitzer. No dividends were declared on said stock during the succeeding years of 1907 or 1908, or until July 1, 1909, when a dividend of three dollars per share was paid, followed semi-annually by similar dividends up to the time of the trial in March, 1914. In February, 1911, at a point of time four years and over subsequent to the date of the sale and transfer of the stock to Mrs. Schweitzer, the Central Trust Company and the Anglo-California Trust Company became merged. At the time of the merger Mrs. Schweitzer delivered up her shares, and received in exchange therefor six shares of Anglo-California Trust Company stock, and the sum of \$80, which sum was the equivalent of a fractional two-thirds share of said stock. On February 1, 1913, six years after the sale of the stock to the plaintiff, he was informed that his sister-in-law, Mrs. Schweitzer, felt bitter toward him on account of his having sold her the stock, and upon interviewing her upon the subject she informed him that she had not received any dividends on the stock until July, 1909, and also that he had misrepresented the value of the stock to her, and that it was not worth the sum of \$110 per share at the time of her purchase. Thereafter plaintiff claims he paid to Mrs. Schweitzer the sum of \$420. This sum, it appears, was the difference between eight hundred dollars, which was the value that the plaintiff and Mrs. Schweitzer determined the stock to be worth, and the sum of one thousand one hundred dollars, the price paid to plaintiff by Mrs. Schweitzer for the stock; and it seems this sum was sufficient to include interest from the date of the investment. On May 16, 1913, six years and four months after the sale by defendant to the plaintiff of the stock, and four years

subsequent to the resumption of the payment of regular dividends thereon, plaintiff filed his complaint herein alleging fraud in the procurement of the sale. Plaintiff alleged in his complaint as a basis for his cause of action that at the time of the sale by defendant to plaintiff, the defendant represented to him that said stock was worth the sum of one thousand one hundred dollars, being \$110 per share, and was bearing interest at the rate of six per cent per annum. The evidence in support of this allegation shows that defendant informed plaintiff that he had *paid* the sum of \$110 per share for the stock. With reference to the alleged representations of defendant concerning the interest, the evidence is not clear upon the point as to whether or not the defendant represented that the stock was paying five or six per cent at the time of its transfer from the defendant to plaintiff. However that may be, the judgment cannot stand for the reason that there is absolutely no evidence in the record of the value of the stock either at the time of its transfer from the defendant, or at the time of its transfer from the plaintiff to Mrs. Schweitzer. The only evidence relating in any way to that phase of the case consisted of the testimony of Mr. Ouer, a witness for the plaintiff, who is the cashier of the Anglo-California Trust Company, and who was the assistant cashier of the Central Trust Company during the years 1906 and 1907. His testimony was to the effect that the nonpayment of dividends would not necessarily indicate a decrease in the actual value of the stock, and that the stock would really be worth more by the nonpayment of dividends, providing the company was doing a profitable business. He also testified that the stock was not a listed one; that he could not give its actual value in January, 1907, and that its value depended entirely upon supply and demand. From this testimony counsel for plaintiff argues that it follows that the stock was worthless at the date of both sales, and only became valuable at the time of the merger of the Central and Anglo-California Trust Companies, four years thereafter, at which time the damages became crystallized and fixed, and that therefore the date of the merger is the only date possible at which damages could be assessed in view of the plaintiff's alleged excusable delay in the discovery of the alleged fraud.

While the payment of dividends and the amount thereof are elements affecting the value of corporate stock, it by no

means follows that such stock has no value because of the failure to pay dividends thereon. (*Wegerer v. Jordan*, 10 Cal. App. 362, 365, [101 Pac. 1066].) In cases of this character the measure of damages is the difference between the value of the stock at the time of the transaction if the alleged representations had been true, and what it was then actually worth. However, the amount of the verdict was undoubtedly based upon the compromise agreement made between plaintiff and his sister-in-law six years after the transaction took place; and that this is so is evident from the fact that the verdict is for the exact amount claimed to have been paid to her by the plaintiff. Conceding that this sum represented the difference in value of the stock between the time of sale and the date when the merger of the companies took place, it by no means affords a criterion of the value of the stock at the time of the sale. We conclude, therefore, that there being no evidence of the value of the stock at the time of the transfer, there is absolutely no basis upon which a verdict could be predicated.

Defendant also invokes the statute of limitations as a shield to the action. As before stated, the complaint was filed six years and four months after the alleged fraud. No facts are pleaded showing why the alleged fraud was not sooner discovered. The complaint contains the mere statement that the fraud was not known or discovered by the plaintiff until about the first day of February, 1913. Such an allegation is insufficient to excuse the delay in bringing the action. (*People v. San Joaquin Valley etc. Assn.*, 151 Cal. 797, [91 Pac. 740]; *Truett v. Onderdonk*, 120 Cal. 581, 589, [53 Pac. 26].)

The judgment and order denying a new trial are reversed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1416. Third Appellate District.—December 1, 1915.]

JOHN W. ULM, Respondent, v. CLARENCE M. PRATHER
et al., Appellants.

RECEIVER—APPEAL FROM ORDER OF APPOINTMENT—RECORD—BASIS OF ORDER—PRESUMPTION.—Upon an appeal from an order appointing a receiver, where there is no bill of exceptions in the transcript or other record showing upon what evidence the court based its order, the presumption must be indulged in support of the action of the court, that it had before it facts sufficient to justify it in making the order, notwithstanding the facts which are disclosed by the complaint might not themselves, taken alone, be enough to warrant the appointment under section 564 of the Code of Civil Procedure.

APPEAL from an order of the Superior Court of Siskiyou County appointing a receiver. James F. Lodge, Judge.

The facts are stated in the opinion of the court.

Taylor & Tebbe, for Appellants.

B. K. Collier, James R. Tapscott, and Tapscott & Tapscott, for Respondent.

HART, J.—The plaintiff brought this action for an accounting and thereby a determination and adjudication of the amount to which the parties to this action are, respectively, entitled, by reason of an agreement of copartnership entered into by and between said parties on the first day of June, 1909.

Besides praying for an accounting, the complaint asks that a receiver to act *pendente lite* be appointed by the court to take charge of the partnership property and assets, "to properly protect and care for the same, and, as soon as practicable and for the best interests of all concerned, market the aforesaid property, and the whole thereof, under the directions of the court, accounting to this court herein for the proceeds thereof."

The court accordingly made an order appointing a receiver, naming one Parshall as such, said receiver immediately qualifying as such by taking the oath of office and entering into and filing an undertaking, with approved sureties, in the sum of six thousand dollars, the amount fixed by the court.

This appeal is brought here by the defendants from the order appointing the receiver.

The complaint discloses that the plaintiff, a resident of Chicago, was the owner of a two thousand acre tract of land in Siskiyou County, this state, and also owned farming implements and other personal property, which were, at the time the copartnership agreement was entered into, situated on said land; that defendants were also the owners of certain farming implements and other personal property suitable for farming purposes; that, by the agreement referred to, the defendants were to take possession of said land, together with the personal property belonging to both parties, and were to operate, farm, and manage said ranch for the mutual interest and benefit of the parties for the period beginning with the first day of June, 1909, and ending on the thirtieth day of September, 1913; that the returns to come from the operation of the ranch by the defendants as a stock and hay ranch should, after the payment of all necessary expenses in conducting the business of the ranch, and of the money used in buying additional stock, tools, implements, etc., and the payment of the principal and interest of any borrowed money or capital used in the business, be divided equally between the parties, either in money or property. It was further agreed that the parties of the second part (defendants) "shall have the right and privilege of using not to exceed seventy-five dollars per month, during each month, of funds produced hereunder, toward defraying their family expenses, which shall be charged against them and against their interest herein," etc.

The complaint alleges that it was mutually stipulated and agreed by the parties to said agreement that the certain personal property heretofore referred to and separately owned by the parties was, as soon as the agreement was signed, to become the joint property of the first and second parties to said agreement and be equally owned by them, half and half, and that any amount due or furnished by the one party over the amount furnished by the other should be considered as money loaned by such party to the coparties, and should draw interest at the rate of six per cent per annum, and should be a first lien against such joint property and payable, principal and interest, from the joint sales of such property, or of the proceeds of the ranch, "and that among the terms of said agreement, any party thereto contributing any amount in ex-

cess of the amount furnished by the other party should be considered as having loaned the coparties such amount, and same should be treated as above specified." The complaint further alleges that the plaintiff, under the provisions of the said agreement, has received the total sum of \$1,520, only, and that, excepting a lot of alfalfa seed of the value of \$73.80, he has never received any other or additional amount as his share of the proceeds of the said agreement or the profits derived from the operation of said ranch; that the amount of the advances made by the plaintiff under the said agreement during the life thereof, including interest thereon at the rate of six per cent per annum, is the sum of \$3,289.70; that the amount received by the defendants under the provision of the agreement allowing them the privilege of using the sum of \$75 per month during each month out of the funds produced on the ranch is the sum of \$3,850, and that no portion of said sum has been paid by the defendants, or either of them, to said coparties, "or at all"; that the said agreement and the term of the life thereof expired on the thirtieth day of September, 1913, and prior to the filing of the complaint herein; that the plaintiff, prior to that date, notified the defendants that he desired a full and complete settlement at the expiration of the term of said agreement of all transactions had thereunder, "and at the expiration of said term of said agreement said plaintiff personally requested said defendants and each of them to comply therewith, but said defendants then refused, and ever since said last mentioned date have refused so to do." It is alleged that the defendants have removed from the aforesaid ranch a large portion of the joint property of said parties to the aforesaid agreement, without the consent of the plaintiff, "and said plaintiff is, at this time, without definite knowledge as to the status, on September 30, 1913, or at any time since said last mentioned date, of the business transacted under and in pursuance to the aforesaid agreement; . . . that by reason of the failure, neglect and refusal of said defendants and of each of them to render to said plaintiff the statements and reports contemplated by the aforesaid agreement, said plaintiff is unable to ascertain the true condition of affairs of the respective parties to said agreement on September 30, 1913, or since said date."

It is contended by the defendants that the case made by the complaint, a substantially correct statement of whose aver-

ments is above given, is not sufficient to have authorized the court, under the terms of section 564 of the Code of Civil Procedure, to appoint a receiver to take charge of the property involved in this controversy and to dispose of the same as specified in the order under the directions of the court. This contention assumes, of course, that the order appointing the receiver was wholly predicated on the *ex parte* showing made by the complaint; but we cannot say, from the record before us, that such was the case or that there were not other facts presented to the court in the proceeding than those appearing in the complaint.

There is no bill of exceptions in the transcript on appeal. Embodied in the transcript are the following papers and proceedings only: The complaint; the order appointing a receiver; the oath of the receiver; the bond of that officer; the notice of appeal from the order appointing a receiver; and a stipulation by the attorneys of the respective parties allowing the defendants additional time over that prescribed by law for preparing and serving the transcript on appeal. Embodied in the transcript is also the certificate of the clerk of the court in which he declares that "the foregoing transcript contains full, true and correct copies" of the above enumerated documents, papers, proceedings, notice of appeal, stipulation, etc.

It does not appear from the clerk's certificate or otherwise from the transcript that the court, in the appointment of the receiver, acted solely upon or at all considered the disclosures made by the complaint relative to the joint property of the parties or its situation, except in so far as the complaint disclosed that a cause of action existed in favor of the plaintiff and the nature of such action; nor is it made to appear by the transcript whether the court did or did not take oral testimony or receive affidavits or depositions in support of the application. In brief, there is, as stated, no bill of exceptions in the transcript and no record in any other form authorizing a review of the action of the court in appointing a receiver.

The order appointing a receiver itself contains the only information furnished by the transcript of the proceedings directly culminating in the making thereof, and it cannot be determined therefrom upon what evidence or considerations the court founded its order. The preamble of the order recites that "it appearing to the court from the complaint that there exists a cause of action in favor of said John W. Ulm

against said defendants, Clarence M. Prather and Mary L. Prather, and that there is in existence certain property referred to in said complaint and hereinafter referred to, which is owned jointly by said plaintiff and said defendants, and it *further appearing* that the aforesaid property is in danger of being removed and the rights of said plaintiff therein jeopardized, . . . ,” and here follows the order appointing one W. R. Parshall as receiver. Thus it will be noted that, as stated, the order itself does not disclose the nature and extent of the proceedings leading to the making of the order, or what constituted the basis of the court’s action in making it.

In the absence of an affirmative showing that the court abused its authority in appointing the receiver, the due regularity of the court’s action in that regard will be presumed. In other words, there being no bill of exceptions or other record showing upon what evidence the court based its order, the presumption must be indulged, in support of the order, that the court had before it facts sufficient to justify it in making the order, notwithstanding that the facts which are disclosed by the complaint might not themselves, taken alone, be enough to warrant the appointment of a receiver under section 564 of the Code of Civil Procedure.

But what was said by Chief Justice Sullivan, in the very recent case of *Borges v. Dunham*, 169 Cal. 83, [145 Pac. 1011], is peculiarly pertinent to the record before us, and is decisive of this case: “If we consider the appeal as taken under the old method, it is ineffectual for the purposes of review, because it contains no bill of exceptions showing what papers were used or what evidence was introduced on the motion. If we consider the appeal as taken under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appeal is abortive, because appellant, after filing notice of appeal, took no further steps under those code sections to procure a record to be used on appeal. For the reasons stated it is impossible with the record before us to review the order appointing the receiver. As the filing of the notice of appeal in the court below, treating the appeal as taken under the new method, conferred jurisdiction upon this court, and as a mere inspection of the record shows that appellant is entitled to no relief, the proper order for this court to make in response to the motion to dismiss is to affirm the order appointing a re-

ceiver. (*Hibernia Savings & Loan Soc. v. Doran*, 161 Cal. 118, [118 Pac. 526].)"

It follows from the foregoing that the order appointing the receiver must be affirmed, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1431. Third Appellate District.—December 2, 1915.]

EMILY WILLS, Appellant, v. E. K. WOOD LUMBER & MILL COMPANY, Respondent.

QUIETING TITLE — FRAUDULENT CONVEYANCE — EVIDENCE — SUPPORT OF FINDING.—In this action to quiet title involving the validity of a deed of real property made by a husband to his wife, it is held that the evidence supports the findings that the husband, and not the wife, was the legal owner of the property at the time the deed thereof was made, and that such deed was void as to creditors of the husband because of lack of consideration and the insolvency of the grantor at the time of its execution.

BANKRUPTCY—JUDGMENT LIEN—WHEN PRESERVED.—The lien of a judgment as a preferential lien in favor of a creditor of a bankrupt is dissolved when the petition in bankruptcy is filed within four months of the obtaining of the judgment, but may be preserved for the benefit of all the creditors in a case where the dissolution of such lien would militate against the best interests of the estate of the bankrupt.

DISCHARGE IN BANKRUPTCY—LIENS NOT AFFECTED BY.—A discharge in bankruptcy releases from personal liability only, and has no effect upon liens against the property of the bankrupt.

FRAUDULENT CONVEYANCE—CONSTRUCTION OF SECTION 3442, CIVIL CODE—PROOF OF FRAUD—WHEN UNNECESSARY.—Section 3442 of the Civil Code makes a transfer fraudulent and void as to existing creditors, as a matter of law, when the transfer is voluntary or without a valuable consideration, by one while insolvent, or in contemplation of insolvency, and no proof of actual fraud is necessary.

ADVERSE POSSESSION—VOID DEED FROM HUSBAND TO WIFE.—The rule that a married woman not living separate and apart from her husband and having no claim in her own right to land cannot acquire title to it as her separate estate by adverse possession, is applicable to a case where the wife claims separate ownership under a void deed from the husband.

APPEAL from a judgment of the Superior Court of Marin County, and from an order denying a new trial. **Edgar T. Zook, Judge.**

The facts are stated in the opinion of the court.

Martin Stevens, for Appellant.

Martinelli & Greer, for Respondent.

CHIPMAN, P. J.—Plaintiff commenced the action to quiet her title to a certain lot situated in San Anselmo, Marin County, as against the claims which, it is alleged, defendant makes to the property.

Defendant answered, denying plaintiff's ownership and denying that defendant's claim to the property is without right. Further answering, alleges: That defendant is the owner and entitled to possession of the property; that, on October 8, 1906, and long prior thereto, plaintiff and one Hamilton Wills were, and ever since have been and now are, husband and wife, and on said day said Hamilton Wills was the owner seized in fee and in possession of the whole of said real property; that on said day he was indebted to defendant in the sum of \$4,432.72 for goods, wares, and merchandise theretofore sold and delivered by defendant to Hamilton Wills, and in addition to said indebtedness the said Hamilton Wills was also indebted to divers other persons in large sums of money, the amount of which defendant is unable to state; that on said date and for a long time prior thereto the said Hamilton Wills was unable to pay his debts in full from his own means as the same became due in the ordinary course of business, and was insolvent, all of which was well known to plaintiff; that on said day said Hamilton Wills, while so indebted and so insolvent, "and with full purpose and intent to hinder, delay, and defraud his creditors, and particularly this defendant, and designing to cheat his creditors and particularly this defendant, did voluntarily and without valuable consideration make, execute, and deliver to plaintiff a conveyance transferring to plaintiff all of said real property"; that on February 12, 1908, there was still due from said Hamilton Wills to defendant on account of said indebtedness of \$4,432.72 a balance of \$2,680.82, and that thereupon,

upon said last named day, defendant commenced an action against said Hamilton Wills, in the superior court of said county, to recover said balance; that on June 25, 1908, a judgment was duly given, made, and entered in said action in favor of defendant and against said Hamilton Wills for said balance, together with \$15.50 costs of suit, which said judgment was duly docketed in the office of the county clerk of said county; that on the thirty-first day of October, 1910, a writ of execution was duly issued out of said court in said action directed to the sheriff of said county, who did, after due proceedings had, according to law, duly sell all of said premises to the defendant, and that a certificate of sale was duly issued by said sheriff to this defendant, and thereafter, on January 12, 1912, said sheriff duly executed and delivered to this defendant a deed conveying all of said property, which said deed was duly recorded on January 19, 1912, and ever since said twelfth day of January, 1912, this defendant has been and now is the owner of all said property and entitled to possession thereof.

The court found the facts substantially as alleged in the answer and, as conclusions of law, found that the transfer of said property by said Hamilton Wills to plaintiff, on October 8, 1906, "was fraudulent and void as to this defendant"; that plaintiff take nothing by her complaint and "that defendant is entitled to the judgment and decree of this court that it is the owner of and entitled to the possession of all of said real property," etc.

Judgment was accordingly entered for defendant, from which and from the order denying her motion for a new trial plaintiff appeals.

Plaintiff testified: "I am the owner of the property described in the complaint herein. I acquired said property in 1905 and went into possession thereof in September, 1905, and went to live upon the property at that time. At that time I had upon the property a little shack that cost about two hundred dollars. Ever since September, 1905, I have been living upon that property with my husband. Nobody but myself has been in possession of that property since September, 1905. I have paid all of the taxes which have been levied upon the property since September, 1905, and during all that time I have been in the exclusive possession of that property. I paid four hundred dollars for the lot." There

was received in evidence on the part of plaintiff a declaration of homestead by plaintiff, in due form, of date July 7, 1908, duly acknowledged and recorded on that day, "for the joint benefit for myself and husband." The value of the property was "estimated to be five thousand dollars."

On cross-examination she testified: "I acquired the property in June or July, 1905, from Mr. Croker. My husband bought the property from my money. My husband did business for me: I had about one thousand five hundred dollars at that time. I put my money in the First National Safe Deposit and the next time my husband bought a safe I put it in his safe, in a little tin box at San Francisco. . . . I came to California in 1888 or 1889. I came here in February and married Mr. Wills in the following November. I had over one thousand dollars when I married Mr. Wills. I do not know exactly how much over. I did not have any talk with Mr. Croker. (Mr. Croker conveyed the property to her husband.) I was very sick at the time. I earned money after I was married; I earn it still; I keep boarders. My husband went on the road. I kept boarders and raised chickens and made more money than he did. I loaned him money. In the sale and purchase of this property my husband was the agent for me on account of I was not acquainted with this language only a little. I was green to this country. Besides I was very sick. . . . Physically or mentally I was in no condition to transact business in 1905. My husband negotiated with and made the contract with Mr. Croker. Q. Do you know to whom Mr. Croker gave the deed to the property? A. Well, my husband done the business. I was in no condition to transact business. I don't know what they done. My husband took the money out of the safe deposit and paid cash for the property. He took it out of his safe. My husband kept the property in his name for quite a while and the papers were burned up; then I wanted the property recorded in my name; it belonged to me. . . . After the earthquake, when my husband went to the city, he said, 'The whole thing is destroyed,' safe and everything in his office, and after that he said, 'All my papers were destroyed.' He said, 'That is destroyed, too.' I said, 'You had better go to Mr. Croker and have a new deed and have it recorded who it belongs to, in my name.' . . . About this deed I said (to her husband) 'How can we settle it then?' we have no deed. I want to

have this property. I am well now and I want to have it, make it my home, so if anything, business or like such things, I could always make a living on it.' I think he went to Mr. Croker a couple of months after that when things were getting quiet."

At this point in plaintiff's testimony defendant introduced a grant, bargain, and sale deed, dated October 6, 1906, made by Frederick Croker and his wife to Hamilton Wills, recorded on the same day. Also, deed of gift, dated October 8, 1906, from Hamilton Wills, to his wife (plaintiff), recorded on the same day. On further cross-examination, she testified: "In 1905 a little shack was built on that lot. I bought it. My husband paid for it—the lumber. I gave him the bills. Not much lumber was bought from E. K. Wood Lumber & Mill Co. It only amounted to about three hundred dollars. My husband had the four hundred dollars to buy the lot in his safe. I told him to take it when I was in the hospital. I gave my husband all the money I had just for this property. I wanted to have a home. The doctors told me I must go into the country if I wanted to live; my husband was then a contractor building houses over in Marin County. I gave him that money to buy a home. . . . After I got out of the hospital, I came over to San Anselmo to live and the property was bought in June or July, 1905; when I first came to San Anselmo I was just camping; lying on a cot in a tent; in May, 1905, when I was in hospital, I said to my husband, 'Take all you need to get a home—buy a home,' and he took all of the money, I saved all my life for it; that money was over a thousand dollars." On re-examination she testified: "Q. Was anything said by either of you as to whose name the property was to be taken in at that time? A. At that time I just say to my husband, 'Buy a property, buy a home.' At the time I just left everything to him as my agent, but I want to have it as my home. Q. You wanted him to buy a home for you with your money? A. Yes, sir, from my money. Q. Did he understand that from you? A. I guess he did. Q. Did you so tell him? A. Yes, sir." On recross she testified: "My husband handed me the deed when he put the property in my name in 1906 and said, 'There is your property,' and I say, 'Now, for you to take the deed and put it in the safe deposit.' When he put it in my name he showed it to me and he went up to the city. I had no talk with him

about the deed at all; I was glad; I had my property; that is all; I saw my name in the deed. . . . When he showed it to me it had been recorded; I paid a dollar for recording it. . . . When he showed me the deed with my name, he came from San Rafael; it was already recorded; he showed it to me after it was recorded."

Plaintiff rested at this point of the evidence. Concerning the execution of the deed to her husband, witness Croker, Wills' grantor, testified: "I know Hamilton Wills; known him since 1905. I sold to Mr. Wills a lot in Ross Valley Park, lot 137, being the lot described in plaintiff's complaint, for four hundred dollars, terms cash; he made a deposit of half the cost and within thirty days, I think, paid the balance; am not sure, though; within the thirty days I made the deed transferring the property to him. The Court: Q. What did he say in reference to the purchase, if anything, to you? A. I don't remember. Q. Did he say he was purchasing it for anybody? A. No. Q. Other than himself? A. I think not." Here was introduced a receipt signed by Mr. Croker, dated June 21, 1905, acknowledging the receipt from Wills of two hundred dollars deposit on account of four hundred dollars, the purchase price of the property. Balance was to be paid in thirty days. He testified that he afterward made a deed to Wills. "I made a second deed to him. (Above referred to of date October 6, 1906.) At the time I made this second deed to Hamilton Wills I do not know whether he asked me to execute the deed to his wife. I don't remember much about what was said by either of us at that time. I know he made some excuse for wanting the second deed. He did not at any time ask me to make a deed to his wife; he gave me some reason for wanting a second deed; it was satisfactory to me." Witness Studley, before whom the deed was acknowledged by Croker, testified that he knew of the deed formerly given Wills by Croker and asked Wills why he had not recorded it. "I had been collecting taxes, but I noticed the property was still assessed to Mr. Croker and I asked him (Wills) why he hadn't recorded the deed. I do not remember his answer at all. Q. Did he at any time say to you the property was the property of his wife, Emily Wills? A. No, sir."

Witness Pitcher, manager of defendant corporation, testified that he knew the land involved and that his company

"sold to Mr. Wills the materials for improvements or building on that land. He told me he bought the lot and wanted to build a house on it. That was in the fore part of 1905; that was the first business we did with him; to furnish material on this property in question. When we were furnishing lumber to him he put up one house at first; then I think he put up another house afterward, and the stable; he did not state to me that was his wife's property. Q. His statement to you was he had bought the property? A. He told me it was his property." This occurred before Wills conveyed the property to his wife and after Croker had conveyed it to him.

The foregoing is the evidence bearing upon the question of plaintiff's ownership of the land on October 8, 1906, the date of the deed of gift to her by her husband. The court found that, on that date, "Hamilton Wills was the owner, seized in fee, and in the possession of the whole of the real property mentioned in plaintiff's complaint." Mr. Wills was called as a witness by defendant and testified at some length, mainly concerning his condition as to solvency, which we shall have occasion to notice later. But he said nothing, and was asked no question by either party, as to what occurred when he made the purchase of the land in question.

The claim of plaintiff is that the property in question was purchased with her money and became her separate estate, though the deed originally was made to her husband, and that when he conveyed the property to her, on October 8, 1906, her title was unassailable by the then creditors of her husband.

The position of defendant is that, on October 8, 1906, her husband was insolvent, and that the conveyance made by him to his wife was voluntary and without consideration, and, under section 3442 of the Civil Code, was fraudulent and void as to existing creditors "and appellant has no right, title, interest or claim in or to said property."

It is not shown that defendant or any of the creditors of Wills knew that his wife claimed the property prior to October 8, 1906. Except as appears from her testimony, it was not shown that her husband understood that he was to make the purchase for her. His acts, unexplained, would seem to leave a strong inference that there was no such understanding. Without entering upon an analysis of plaintiff's testimony, we think the facts and circumstances thus far disclosed warranted the court in finding that, on October 8, 1906,

Hamilton Wills had the legal title unaffected, so far as his creditors were concerned, by any equity of his wife in the property.

The question we are next to determine is, Was Mr. Wills insolvent at that time and were the subsequent proceedings, as they appear in the record, sufficient to justify the finding that defendant, ever since the twelfth day of January, 1912, "has been, and now is, the owner of all said property." There was evidence that, on October 8, 1906, Wills was indebted to defendant in the sum of \$4,432.72, on which some payments were afterward made, leaving due, in February, 1908, \$2,680.82, for which defendant brought suit, and, on June 26, 1908, obtained judgment against Wills "which was never vacated, modified, or set aside or appealed from and duly became a final judgment in said action."

It appeared that, on October 16, 1906, Wills made an assignment to E. B. Martinelli of his interest in certain building contracts for the construction of two two-story residences in Ross Valley, "in trust to be applied by the said Martinelli to the payments of said amounts as may hereafter become due to any person, firm, or corporation on account of materials furnished or labor performed in completing said contracts. Any balance remaining of said moneys after full payment of all amounts which may hereafter become due after completing said contracts as aforesaid, shall be paid by said E. B. Martinelli *pro rata* to the following named persons who now have claims against the said contracts, to wit: E. K. Wood Lumber & Mill Company. Fox (electrician). Pearson (plasterer)." It appeared that this assignment was made because Wills was financially unable to purchase the necessary materials to complete the buildings; that, prior to October 8, 1906, he had been pressed by defendant for payment but was unable to respond; that he paid some installments and had reduced the debt, as above stated, when defendant brought suit against him. Wills was called as a witness by defendant, and testified that he was solvent at the above date; that he had one thousand dollars or one thousand two hundred dollars in bank and owned certain personal property the value of which he stated at about three hundred dollars, besides his interest in the said assigned contracts. His statement that he was solvent was disputed by uncontroverted evidence. He filed a voluntary petition in insolvency on July 10, 1908, on July 17,

1908, was adjudged an insolvent, and, on October 31, 1908, he was duly discharged in bankruptcy. In his petition he showed liabilities amounting to \$4,241.02 and assets amounting to \$3,416.35, of which \$658 was claimed as exempt. Among the liabilities was stated \$2,680 due defendant "1906-1907." On the schedule were the names of nineteen other creditors in various amounts, some of which were of date 1905 and 1906 and some in 1907. Witness Pitcher, manager of defendant corporation, testified that his company continued to do business with Wills after October 8, 1906, and "sold him roughly nine thousand dollars' worth of stuff, after October 8, 1906; the last date was February 12, 1909," and plaintiff contends that this is inconsistent with the claim that Wills was insolvent October 8, 1906. Pitcher testified that of the \$4,432.72 due on that date Wills paid all but \$2,680.82; "that was part of the indebtedness due to defendant on October 8, 1906; no part of that \$2,680.82 has ever been paid to defendant," and this was the amount for which defendant obtained judgment, June 26, 1908, as stated above, and is the amount mentioned as due defendant in Wills' schedule of debts filed in the bankruptcy proceeding. There is no explanation as to the payments made on purchases from defendant after October 8, 1906. Presumably, they were met at the time as the claims accrued. It is urged as unlikely that defendant would continue doing business with Wills if defendant knew him to be insolvent and unable to pay debts then due defendant. It is not unusual for creditors to give extensions or make advances to debtors to tide them over conditions of financial stress, in the hope that they may find relief from their embarrassments. Indulgences of this character may continue over a considerable space of time but without favorable results, as appears to have been the case here. If Wills had paid his debts existing on October 8, 1906, and the liabilities which forced him into bankruptcy had arisen after the date named, there might be merit in the contention that he was not insolvent when he conveyed the property to his wife. But the evidence is that he was not then able to pay his debts out of his own means, nor was he so able at any later date. His insolvency existed on October 8, 1906, and continued to the date when he was declared an insolvent, his schedule of debts showing dates prior to 1906. The court found that on that day, and for a long time prior thereto,

Hamilton Wills was indebted to defendant in the amount stated, "and was also indebted to divers and other persons in large and sundry sums of money and that on said eighth day of October, 1906, Hamilton Wills was unable to pay his debts in full from his own means as the same became due in the ordinary course of business and was insolvent." We think there was evidence sufficient to support this finding.

It remains to notice by what means defendant obtained title to the land. Defendant's judgment was entered June 26, 1908, and Wills was adjudged a bankrupt on July 17, 1908. The judgment having been entered within four months prior to the filing of the petition in bankruptcy, it was dissolved by the adjudication of Wills' bankruptcy (subsec. c, sec. 67, Bankrupt Act); and the trustee of the estate of such bankrupt "shall be subrogated to and may enforce such right of such creditor for the benefit of the estate." (Bankrupt Act, sec. 67b.) The consent of E. K. Wood Lumber & Mill Company to such subrogation was duly filed. On June 6, 1910, by the trustee of the estate of Wills, a bankrupt, a petition was filed for an order that "the trustee be subrogated to the rights of the said E. K. Wood Lumber & Mill Company, and that the rights under said judgment pass to and be preserved for the benefit of the estate of the said bankrupt and for such other and further order as to this court may seem meet and proper." Section 67e, *supra*, further provides: "Or, if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved but the trustee . . . shall be subrogated . . . and empowered to perfect and enforce the same . . . as such holder might have done had not bankruptcy proceedings intervened." In his petition the trustee alleged that Wills was the owner of the land in question on October 8, 1906; that on that day he conveyed the property to his wife without consideration; that he was then insolvent and that said transfer was made with intent to delay and defraud the creditors of said Hamilton Wills; set forth also the facts as to the indebtedness of Wills to E. K. Wood Lumber & Mill Co. and as to its obtaining judgment as hereinabove shown; that Emily Wills had executed a declaration of homestead on said property, as already shown; that Wills had filed his petition in bankruptcy and had been adjudicated a bankrupt, etc.

On June 6, 1910, Milton J. Green, referee in bankruptcy, made his order in which all the foregoing proceedings are recited as set forth in said petition of the trustee; also that said E. K. Wood Lumber & Mill Company had appeared in open court, and agreed with the trustee herein that said company "should prosecute, in the name of said trustee and for the benefit of the estate of said bankrupt, an action to set aside the conveyance of October 8, 1906, hereinbefore referred to from said Hamilton Wills, Jr., said bankrupt, to Emily Wills, his wife, and . . . having further agreed in open court to indemnify the said trustee for all costs that might be incurred in the said action: It is hereby ordered:" (then follows the order subrogating the trustee to all the rights of said company). "It is further ordered that said E. K. Wood Lumber & Mill Company . . . be and they are hereby authorized to commence and prosecute such action and to pursue such legal remedies as they may deem proper in order to enforce the rights arising out of the judgment hereinbefore referred to, and to set aside and annul that certain conveyance made by the said bankrupt to Emily Wills, his wife, on the 8th day of October, 1906, . . . and said E. K. Wood Lumber & Mill Company is hereby authorized to prosecute such action in the name of the trustee herein and for the benefit of the estate of said bankrupt."

Section 67f of the Bankrupt Act provides as follows: "That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustees as part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. . . ."

It will be recalled that the judgment was recovered June 25, 1908, by defendant against Wills, and, on July 8, 1908, plaintiff filed her declaration of homestead upon the property. On July 16, 1908, Wills filed his petition in bankruptcy and, on

the 17th, was adjudged a bankrupt. The transfer by Wills to his wife being void as to creditors, defendant, but for the bankruptcy proceedings, would have been entitled to execution on its judgment and sale thereunder, notwithstanding the homestead declaration, for the latter was subject to the lien of the judgment. (*First Nat. Bank of Los Angeles v. Maxwell*, 123 Cal. 360, 371, [69 Am. St. Rep. 64, 55 Pac. 980]; *Bekins v. Dieterle*, 5 Cal. App. 690, 694, [91 Pac. 173].) The bankruptcy proceedings rendered it impossible for defendant to avail itself of this right. The trustee in bankruptcy became subrogated to defendant's rights, and had it not been for the saving clauses in the Bankrupt Act, the provision of section 67c, under which the lien was dissolved, would have given vitality to the declaration of homestead and the bankrupt would have had the right under the act to have his homestead exempted. But here interposed the provision above quoted, that "if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved," etc. The effect of the statute was to dissolve the judgment as a preferential lien in favor of the creditor but recognized the lien and preserved it for the benefit of all the creditors. (*First Nat. Bank v. Staake*, 202 U. S. 141, [50 L. Ed. 96, 26 Sup. Ct. Rep. 580].)

It was under these provisions of the law that the proceedings above set forth were had, empowering defendant to act in the premises, and it thereupon, on October 31, 1910, caused execution to issue on its said judgment and the property to be sold by the sheriff. On December 3, 1910, the sheriff issued his certificate of sale in due form, reciting that he had sold the property to said E. K. Wood Lumber & Mill Company and, on January 12, 1912, he duly executed and delivered his deed to said property as sheriff to said company in which the usual recitals in sheriff's deeds are set forth, and said deed was duly recorded on the 19th of January, 1912.

Appellant calls attention in her brief to the order of the bankrupt court, authorizing defendant to commence proceedings to annul the conveyance to plaintiff, and now claims that the authority given was to proceed in the name of the trustee and for the benefit of the bankrupt estate, whereas defendant proceeded in its own name for its own benefits and now holds the sheriff's deed in its own name. There was no demurrer to the answer, and no objection was made to the

introduction of the proceedings in bankruptcy except the general objection of immateriality and irrelevancy. The order is susceptible of the construction that the authority was given to the defendant to proceed as it might deem best or to proceed in the name of the trustee. It is clear, however, that in either case the result should, if favorable, inure to the benefit of the bankrupt estate, and we must presume that the trustee will see to it that the estate gets the benefit.

Appellant is in error in assuming that the discharge of Wills from his liabilities had any effect upon the liens existing against his property. He is released from personal liability only. He has no concern with the property which passed to the trustee. Valid liens may be enforced after the bankrupt is discharged. (Loveland on Bankruptcy, 3d ed., sec. 385.)

Appellant is also in error in her contention that proof of actual fraud was necessary. Section 3442 of the Civil Code makes a transfer fraudulent and void as to existing creditors, as a matter of law, when the transfer is voluntary or without a valuable consideration, by one while insolvent, or in contemplation of insolvency. (*Cook v. Cockins*, 117 Cal. 140, 148, [48 Pac. 1025].)

The claim that the premises in question were always the homestead of plaintiff since 1905 is true only in the sense that they constituted her home. As a homestead in contemplation of the statute, free from the claims of her husband's creditors, it is not true. It was subject to the lien of defendant's judgment, as we have seen, and the lien thus created ripened into complete title adverse to plaintiff.

Error is assigned in permitting the defendant, over plaintiff's objection, to make plaintiff's husband a witness against her without her consent. The court allowed questions to be answered as to declarations and acts of Wills affecting the question of his solvency or insolvency on October 8, 1906. The court, however, finally, on motion to strike out all of Wills' testimony "as to declarations made subsequent to the execution and delivery of deed of gift of October 6, 1906, to his wife," said: "The Court: They will not be considered. I will simply make a general rule. I will not consider them in deciding the case. You cannot direct me to the particular things at this time. The motion will be granted if there are any declarations subsequent." We must assume that the court did as it promised to do. The insolvency of Wills was

shown irrespective of any testimony given by him which the ruling of the court excluded.

Plaintiff claims that she established title by prescription; that her possession after October 6, 1906, was adverse, open, and notorious under claim of separate ownership, and continued for more than five years prior to the commencement of this action, and that she paid all taxes which have been levied and assessed upon the premises. Defendant ignores this claim in its brief, and has not given the court any aid in solving the question. The undisputed evidence was that plaintiff and her husband were in possession of the lot in 1905 under the deed from Croker to Wills; that on October 8, 1906, Wills conveyed the lot to plaintiff and the deed was recorded on that day; that plaintiff and her husband have ever since had possession of the lot and plaintiff has paid all the taxes levied and assessed against the property since said date.

We held, in *Madden v. Hull*, 21 Cal. App. 541, [132 Pac. 291], that a married woman not living separate and apart from her husband and having no claim in her own right to land cannot acquire title to it as her separate estate by adverse possession. The deed to her by her husband we have held was null and void, and conveyed no title. She, therefore, had no claim in her own right and the rule just stated would seem to apply. If it should be said that her declaration of homestead imported color of title, five years had not elapsed from its date, July 8, 1908, before this action was commenced, to wit, September 23, 1912. It may be doubted, also, whether the adverse claim continued to run after the proceedings in bankruptcy were commenced and the subrogation of the trustee to the rights of the E. K. Wood Lumber & Mill Company in the judgment which was a lien on the property. These proceedings were had in 1910, under which the property was in that year sold to satisfy the judgment, and the sale culminated in the deed, the source of defendant's title.

We have thus endeavored to dispose of the somewhat complicated questions in the case so far as plaintiff has presented them in her brief. Our conclusion is that the evidence supports the findings and the findings support the judgment.

The judgment and order are therefore affirmed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 1401. Third Appellate District.—December 3, 1915.]

LUCY A. SWEET, Respondent, v. RICHVALE LAND COMPANY (a Corporation), et al., Appellants.

EJECTMENT—EXECUTORY CONTRACT OF SALE—RECOVERY OF POSSESSION BY VENDOR—PLEADING—SUFFICIENCY OF COMPLAINT.—A complaint in an action by a vendor to recover the possession of land of which the vendee was in possession under an executory contract of sale, which alleges ownership and right of possession in the plaintiff and the failure of the defendant to comply with the terms of the contract as to the payment of the price, followed by an allegation of demand for such payment or possession, states a cause of action in ejectment.

ID.—RECOVERY OF POSSESSION AND MONEY DUE—JOINDER OF CAUSES OF ACTION—ERROR WITHOUT PREJUDICE.—An objection that a cause of action for the money due under the contract had been improperly joined with the action for the recovery of the possession of the land, should be made by demurrer on that ground, but any error in such a misjoinder is without prejudice, where all claims for a money judgment are waived.

ID.—AMENDMENT OF COMPLAINT—CAUSE OF ACTION NOT CHANGED.—There is no error in allowing the plaintiff to amend the complaint after submission of the cause by adding thereto the allegation that the contract provided that in the event of a failure to comply with its terms, the defendant forfeited all rights to the property and the plaintiff was released from all obligations to convey.

ID.—JUDGMENT FOR POSSESSION—FORFEITURE INCLUDED.—In such an action a judgment for possession of the land necessarily involves the forfeiture of all rights of the defendant under the contract.

APPEAL from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

J. Oscar Goldstein, for Appellants.

King & King, for Respondent.

BURNETT, J.—The action is in ejectment. The basis of the controversy is an executory contract of sale, the parties thereto being plaintiff and one E. A. Rhinesmith, the latter's interest therein having passed by regular assignment to one John S. Hastings. The complaint alleges ownership and the

right of possession of the property in plaintiff; that, on the first day of October, 1912, said Rhinesmith and plaintiff entered into a contract of sale and purchase of said land (setting out said contract); "that under said contract, said defendant took possession of said premises; that said contract provides that in event of a failure to comply with the terms of said contract, defendants forfeit all right to said property, and said plaintiff is released from all obligation in law or equity to convey said property." Then follow allegations of the various assignments of Rhinesmith's interest terminating in said defendant John S. Hastings, "who is now in possession of said premises." It further appears that a payment of six hundred dollars, due under said contract on October 1, 1914, together with interest on deferred payments, was not made; that demand was made for said payment or possession of the premises, but that both were refused and defendant "unlawfully withholds possession of said premises from plaintiff; that plaintiff has complied and is ready and willing to comply with all the terms of said contract."

That a cause of action in ejectment is thus stated is entirely clear, and the proposition needs no elaboration. It is sufficient to refer to *Haile v. Smith*, 128 Cal. 415, [60 Pac. 1032]; *Gervaise v. Brookins*, 156 Cal. 103, [103 Pac. 329]; *Empire Investment Co. v. Mort*, 171 Cal. 336, [153 Pac. 236]. The general demurrer of defendants was, therefore, properly overruled.

Defendants also contend that there was a misjoinder of two causes of action—that is, for the recovery of the possession of the realty and also of the amount of money due under the contract; furthermore, that defendant Richvale Land Company was improperly made a party defendant to the action. The demurrer, however, was as follows: "The defendants, Richvale Land Company, and John S. Hastings, appearing herein by their attorney, J. Oscar Goldstein, demur to the complaint herein upon the grounds: First: That the complaint does not state sufficient facts to constitute a cause of action against the defendants herein. Second: That the complaint joins several causes of action in one complaint and is uncertain and ambiguous."

Of course, if said defendants intended to rely upon a misjoinder of causes of action or of parties, it should have been specifically pointed out by the demurrer. Their effort in

that regard was equally defective as their assignment of uncertainty and ambiguity. It may be said, also, that if a demurrer had been interposed on behalf of said company alone, it probably would have been sustained. It is apparently true that no cause of action was stated against it, but the demurrer was a joint one on the part of said company and Hastings. So, also, in the subsequent proceedings they were treated by their attorney as sustaining the same relation to plaintiff and to the cause of action, and that the complaint and the evidence were sufficient as against Hastings there can be no kind of doubt.

Another thing to be stated is that plaintiff waived any claim for a money judgment, in fact eliminating that feature altogether from the case. So that if we concede that there was error in misjoining the said two causes of action, it is quite apparent that it was entirely without prejudice.

One or two other considerations remain to be noticed briefly. After the cause was submitted the court allowed an amended complaint to be filed to conform to the proof, and it is contended by appellants that thereby the cause of action was changed. But in this they are entirely mistaken. It is admitted by appellants that "the court had the right and power to allow an amended complaint to be filed to conform with the proof, even after submission of the case." This practice has, indeed, been approved many times by the appellate courts. It has, however, been held that under such permission plaintiff "is not entitled to file an amended complaint containing statements of new and distinct causes of action not contained in the original complaint." (*Bowman v. Wohlke*, 166 Cal. 121, [Ann. Cas. 1915B, 1011, 135 Pac. 37].) But a comparison of the original with the amended complaint here shows conclusively that no new cause of action was introduced by the latter. The only change of any moment was in adding the allegation "that said contract provides that in event of a failure to comply with the terms of said contract, that defendants forfeit all right to said property and said plaintiff is released from all obligations in law or equity to convey said property." This did not change nor affect the cause of action. The original complaint showed that this contract had been executed and that by failure of appellants to comply with its terms they had forfeited the right to the possession of the land. Indeed, the cause of action was grounded

upon this failure to pay the installments as required by said contract, and all that could be said is that the amended complaint stated the cause of action somewhat more fully than the original. The truth is, as we conceive it, that there was no necessity for filing the amended complaint, but it did no harm, neither was it of any consequence that appellants had only one day's notice of it. Indeed, appellants seem to have relied upon said contract as they introduced it in evidence, and, of course, they were not prejudiced by an amendment to the complaint which simply added a formal allegation of one of the terms of said contract.

As to the judgment of forfeiture by appellants of all rights under the contract, it may be said that it was necessarily involved in the judgment for possession. The right of possession depended upon the question whether appellants had complied with or violated the terms of said contract. And having found that the payments had not been made as provided, it necessarily followed, under the agreement itself, that the contract was forfeited and therefore the right of possession of the land destroyed.

The two considerations were inseparably connected and the determination of one necessarily involved the other, although the essential purpose of the action was to secure the possession of the land.

The only part of the judgment, it may be said, of which the Richvale Land Company can complain is that awarding costs to the extent of \$24.20. This seems to be unwarranted, since the complaint really states no cause of action against said defendant, and the evidence shows that said company had and claimed no interest in or to said property. The notice of appeal is somewhat defective, not being several in form, but, under the liberal practice prevailing now, we think it should be held sufficient as an appeal by said company from said portion of the judgment.

The judgment for costs against said Richvale Land Company is therefore reversed and in other respects the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1729. First Appellate District.—December 4, 1915.]

LEE B. COATS, Respondent, v. WARREN H. HORD,
Appellant.

CONTRACT—EXCHANGE OF STALLION AND MULE—RESCISSION.—In an action for the rescission of a contract for the exchange of a stallion for a jack mule, where the court found upon sufficient evidence that the exchange had been brought about through certain statements made by the defendant, which amounted to an express warranty of the foal-producing qualities of the jack, and which had proven untrue, the plaintiff was entitled to rescind the contract, where he did so promptly.

ID.—FORM OF JUDGMENT—RETURN OF PROPERTY.—In such a case the judgment which, while giving to the plaintiff in the form of damages all that the evidence showed the stallion to be worth, made no provision for the return of the defendant's property, was erroneous in this respect, and should be modified.

ID.—WARRANTY—ESSENTIALS.—It is not necessary, in order to create an express warranty of an article of personal property, that the word "warrant" should be employed or that any particular or any formal words of warranty should be used. Any affirmation made at the time of the sale or exchange as to the quality or condition of the thing sold will be treated as a warranty if it was so intended, and if the other party acquired the property on the faith of such affirmation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. William M. Conley, Judge presiding.

The facts are stated in the opinion of the court.

Bridgford & Nunlist, W. A. Nunlist, and E. A. Bridgford,
for Appellant.

Walter H. Linforth, and Linforth & Herrington, for Respondent.

RICHARDS, J.—This is an action brought for the rescission of a contract for the exchange of a stallion for a jack mule, the plaintiff averring that the latter animal proved worthless for the purpose for which he acquired it. The cause was tried upon the issues presented by the pleadings.

The court found that the exchange had been brought about through certain statements made by the defendant which amounted to an express warranty of the foal-producing qualities of the mule, and which had proven untrue. It further found that the stallion was of the value of five hundred dollars, and the court thereupon rendered a judgment in plaintiff's favor for the sum of five hundred dollars, but made no provision in such judgment for the return of the defendant's mule.

The respondent argues in support of such judgment that the finding of the court to the effect that the defendant's mule "was useless and worthless for any purpose and of no value" made it unnecessary to order its return; but we think that this finding must be read in connection with the pleadings and proofs in the case, and, so read, must be limited to the valuelessness of the animal for the uses which induced the exchange.

The appellant contends that the findings of the court with reference to the express warranty of the mule by the defendant are not supported by the evidence in the case; but in this we think he is in error, and that there is sufficient evidence in the record to sustain the findings of the court in that regard. It is not necessary, in order to create an express warranty of an article of personal property, that the word "warrant" should be employed, or that any particular or formal words of warranty should be used. Any affirmation made at the time of the sale or exchange as to the quality or condition of the thing sold will be treated as a warranty if it was so intended, and if the other party acquired the property on the faith of such affirmation. (*McLennan v. Ohmen*, 75 Cal. 558, [17 Pac. 687]; *Luitweiler etc. Co. v. Ukiah etc. Co.*, 16 Cal. App. 198-207, [116 Pac. 707-712].) In this case we think the plaintiff acted in making the exchange upon the defendant's representations as to the foal-getting qualities of his mule, and that he was entitled to rescind, and that he did in fact rescind with sufficient promptitude to satisfy the rule as to rescission.

The appellant's next contention, however, is a more serious one. The judgment of the court, while giving to the plaintiff in the form of damages all that the evidence showed the stallion to be worth, made no provision in the judgment for the return of the defendant's property. We think the court

in this respect was in error, but that it is an error which can be cured by a modification of the judgment without the necessity of another trial of the cause. It is therefore ordered that the judgment of the trial court be so modified as to provide that the plaintiff shall return to the defendant his property upon satisfaction of the money judgment in the plaintiff's favor, and that each of the parties shall pay his own costs upon appeal.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1778. First Appellate District.—December 7, 1915.]

JOSEPH SLYE et al., Petitioners, v. JOHN HUNT, Judge
of the Superior Court, etc., Respondent.

NEW TRIAL—BILL OF EXCEPTIONS—DELAY IN SETTLEMENT—IMPROPER REFUSAL TO SETTLE.—The trial court was not justified in refusing to settle a proposed bill of exceptions, upon the ground of the laches of the party proposing it, where, upon the hearing of the settlement, the judge, after the matter had proceeded for some time, requested counsel for both sides to confer and attempt to agree on certain of the proposed amendments, and to report to him as to what could not be agreed upon, and the further hearing of the matter was continued for such report to be made, four months thereafter elapsing, during which time some ineffectual efforts were made by the parties to come to an agreement, failing in which the proponents caused the matter of the settlement of the bill to be again placed on the calendar of the court, and the bill together with the amendments having in the meantime remained in the possession of the adverse party.

1D.—CHANGE OF LAW AS TO PROCEDURE—APPLICABILITY OF TO PENDING CASES—USE OF BILL OF EXCEPTIONS UPON APPEAL FROM JUDGMENT. The change in the law governing new trials and appeals and taking away the right of an independent appeal from an order denying a motion for a new trial, and substituting a provision which permits the appellants upon their appeal from the judgment to have reviewed the errors, if any, of the trial court in denying their motion for a new trial, applies to cases pending and conditions existing at the time the statute took effect where no substantial remedies are impaired; and in such a case the appellants were entitled to have the bill of exceptions settled for use on their appeal from the judgment.

APPLICATION originally made to the District Court of Appeal for the First Appellate District to compel the settlement of a bill of exceptions.

The facts are stated in the opinion of the court.

Louis H. Ward, and Robert W. Harrison, for Petitioners.

Harold I. Cruzan, for Respondent.

THE COURT.—This is an application for a writ of mandate, directed to the judge of the superior court of the city and county of San Francisco, requiring him to proceed to settle the bill of exceptions and statement in the case of *Julia A. Roberts et al. v. Joseph Slye et al.*, No. 52,138, now pending in said court.

The facts of the case as they appear from the petition are briefly these: The said action of *Roberts et al. v. Slye et al.* was commenced in said court at some time during the year 1913, and came on for trial in the month of December of that year, at which trial a verdict was rendered in plaintiffs' favor on December 18, 1913, for the sum of four thousand five hundred dollars, upon which verdict judgment was entered in due course; that notice of intention to move for a new trial was duly given, and that within sixty days after said judgment an appeal therefrom was perfected to the supreme court. Thereafter, within the time allowed by law and the stipulations of counsel, defendants prepared and served a proposed bill of exceptions, embracing a statement of the case, consisting of 172 typewritten pages, to which the plaintiffs in due course prepared and served their proposed amendments, numbering 143, and containing some 87 pages of typewriting. Thereupon and in due time the defendants notified the plaintiffs of their nonacceptance of said amendments, and on September 21, 1914, delivered the same, together with their proposed bill of exceptions, to the clerk of the court for the judge thereof, accompanied by a number of affidavits upon which the motion for a new trial was to be made. Thereafter, from various causes, the settlement of the bill of exceptions, and consequently the motion for a new trial, were delayed for several months, but finally the former came up for hearing on March 24, 1915, and was then taken up by the court, coun-

sel for both parties being present and no objection to the settlement of the bill of exceptions being made. After the matter of the settlement had proceeded for some time the judge of the court requested counsel for both sides to confer and attempt to agree on certain of the amendments thereto, and report to him as to what could not be agreed upon, and the further hearing of the matter was continued until such report.

It appears that thereafter four months or thereabouts elapsed, during which some ineffectual efforts were made by respective counsel to come to an agreement, and these having failed, counsel for the defendants caused the matter of the settlement of the bill to be again placed upon the calendar of the court. Thereafter the plaintiffs moved the court to dismiss the motion for new trial on the ground of defendants' laches in prosecuting the same. The matters of the settlement of the bill of exceptions and of the motion to dismiss were upon the law and motion calendar for August 20, 1915. The court granted the motion to dismiss the motion for a new trial solely upon the ground of defendants' laches in procuring the settlement of their bill of exceptions, and a few days later refused to settle the bill of exceptions and caused the same to be dropped from its calendar.

We think the judge of the trial court should have settled the defendants' bill of exceptions. Whatever delays there may have been in the course of the preparation, proposal, or amendment of the bill prior to the twenty-fourth day of March, 1915, or whoever may have been responsible for such delays, the fact that on said last named day the judge of the court took up and proceeded with the settlement of the bill, counsel for both parties being present and participating in such settlement without objection, constitutes a waiver and cure of previous delays. (*Hicks v. Masten*, 101 Cal. 651, 653, [36 Pac. 130]; *Horton v. Jack*, 115 Cal. 29, 35, [46 Pac. 920]; *O'Brien v. O'Brien*, 124 Cal. 422, 425, [57 Pac. 225].) On said March 24, 1915, and after the judge and counsel had made some progress toward the settlement of the bill, it appears that the judge suggested to respective counsel that they confer in an attempt to agree upon the amendments to be incorporated in the bill, and that they should at some time thereafter report as to such matters as they might not be able to agree upon. This suggestion was adopted, counsel

for the plaintiffs taking and since retaining the original bill with its proposed amendments. There is some dispute as to who was responsible for whatever delay there was thereafter and during the succeeding four months; but it appears that during a portion of that time the court was in vacation. It is true, as suggested by plaintiff's counsel, that the cases hold that ordinarily the burden is cast upon the proponents of a bill of exceptions to bring the matter of its settlement to hearing and determination even after the proponents of the bill have left it with its amendments with the clerk for the judge (*Miller v. Queen Ins. Co.*, 2 Cal. App. 267, [83 Pac. 287], and cases cited). The present case, however, presents a somewhat different situation. Here the judge, after proceeding some distance in the performance of his duty in the way of settling the bill, referred the matter to both counsel to confer, agree if possible, and report back such matters as they could not agree upon to the judge. He thus constituted counsel for both parties in a sense his aids in the duty which was primarily his own, and by so doing invested each with the responsibility of reporting back to him their failure, if any, to agree upon the bill; and this we think would be peculiarly true when, as is admitted, plaintiffs' counsel took possession of the partly settled bill with its amendments and retained the same until after his motion to dismiss the motion for a new trial had been made. It appears in addition that it was the defendants' counsel who caused the matter of further proceedings for the settlement of the bill to be placed upon the calendar prior to notice of the plaintiffs' motion to dismiss.

We think these admitted facts make it clear that there was no such laches on the part of the defendants in these later proceedings subsequent to March 24, 1915, as would suffice to justify the judge of the court in refusing to settle the bill of exceptions. It is, however, contended by plaintiffs' counsel that the defendants having taken no appeal from the order dismissing (which was equivalent to an order denying) their motion for a new trial, no useful purpose can be subserved by the issuance of this writ, to which the defendants respond, first, that they are entitled to use the bill of exceptions upon their appeal from the judgment; and, second, that at the last session of the legislature the law governing new trials and appeals was so amended as to take away the right of an independent appeal from an order denying a motion

for a new trial, but substituting a provision which permits the appellants upon their appeal from the judgment to have reviewed the errors, if any, of the trial court in denying their motion for a new trial. The plaintiff, however, argues that these amendments are not to be construed as affecting pending but undetermined motions for a new trial at the time the law took effect. No authority is cited in support of this contention; and we are satisfied that the rule is well settled that such changes in the law affecting procedure apply to cases pending and conditions existing at the time the statutes take effect where no substantial remedies are impaired. This being so, the defendants are entitled to have their bill of exceptions settled and to whatever benefits they may derive therefrom upon appeal from the judgment.

It is therefore ordered that the writ issue as prayed for in petitioners' petition.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 3, 1916.

[Crim. No. 431. Second Appellate District.—December 7, 1915.]

In the Matter of the Petition for Disbarment of E. J. EMMONS.

PROCEEDING TO DISBAR ATTORNEY—CONVICTION OF FELONY—PARDON.—

In a proceeding to disbar an attorney upon the sole ground of his previous conviction of a felony, an objection that the conviction was subsequently annulled and set aside by a pardon issued by the governor of the state for the offense set forth in the judgment of conviction should be sustained.

ID.—PARDON—EFFECT OF—GROUNDS FOR DISBARMENT.—A pardon releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense; but this is subject to the limitation that an attorney may be disbarred for acts of a felonious nature, where a pardon has followed the conviction of a crime, since evidence of the criminal acts may constitute proof of the charge that the respondent is unfit to be an attorney at law. This is so for the reason that the pardon does not restore his good moral character.

APPLICATION for disbarment of an attorney filed in the Supreme Court and transferred to the District Court of Appeal for the Second Appellate District.

The facts are stated in the opinion of the court.

James F. Farragher, and Barclay McCowan, *Amici Curias*, for Petitioners.

W. H. Anderson, Loeb, Walker & Loeb, Anderson & Anderson, Rowen Irwin, E. G. Kuster, J. R. Dorsey, and H. E. Johnstone, for Respondent.

CONREY, P. J.—At all times mentioned in the record of this proceeding respondent was, and he now is, an attorney at law admitted to practice in the courts of California. On the sixth day of August, 1915, a petition for his disbarment was filed in the supreme court by a bar association of Kern County, and the matter was thereafter transferred to this court. The petition is based upon a judgment of conviction whereby the respondent was convicted of a felony for asking and receiving a bribe, and a duly certified copy of the judgment of conviction is attached to the petition and is a part thereof. That judgment was rendered on October 31, 1905, and on the twelfth day of March, 1908, was affirmed by the district court of appeal for the third district. The sentence was for five years' imprisonment, the *remittitur* was filed on May 18, 1908, and the term of actual imprisonment began a few days later.

The petition for disbarment is based solely on the judgment of conviction. Apart from that judgment no charge is made that the respondent has committed any act involving moral turpitude, dishonesty, or corruption, or any other act which would be a cause of disbarment. (Code Civ. Proc., sec. 287.) Separate and direct charges would require separate and direct proof, and would open the case to examination by means of other evidence which might be produced by those prosecuting the charge, or by the respondent. Even if (which we do not decide) the judgment of conviction would be receivable as evidence upon such separate charges, it would not be the sole and conclusive evidence provided in a proceeding based solely upon a judgment of conviction of a felony. (Code Civ. Proc., sec. 287, subd. 1.)

The petitioners having relied upon such judgment of conviction as the sole foundation for this proceeding, that judgment is conclusive against the respondent if it is admissible in evidence. If it is not admissible, the case against respondent must fall, because no other evidence can be received in this proceeding.

The respondent has filed herein certain objections which are in the nature both of a demurrer and an answer. We shall not find it necessary to discuss the demurrer. The answer sets forth that the conviction shown by the certified copy of the record of conviction annexed to the petition herein has been annulled and set aside in this, that on the twenty-ninth day of June, 1910, respondent received from the governor of California a pardon for the offense set forth in the judgment of conviction. The respondent submitted to the court with his answer a copy, duly certified by the Secretary of State, of the above-mentioned pardon. This document sets forth by way of recital the fact that the defendant had been released upon parole, and since such release had "proven himself to be an industrious, sober, and upright man"; and that the state board of prison directors by resolution recommended to the Governor of the state that he do extend executive clemency to the defendant. Thereupon the document concludes that the Governor does by virtue of the authority vested in him by law, "hereby pardon the said E. J. Emmons and order that he be restored to citizenship."

It has been held that a pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." (*Ex parte Garland*, 4 Wall. 333, [18 L. Ed. 366].) This is nevertheless subject to the limitation that an attorney may be disbarred for acts of a felonious nature where a pardon has followed the conviction of a crime, since evidence of the criminal acts may constitute proof of the charge that the respondent is unfit to be an attorney at law. This is so for the reason that the pardon does not restore his good moral character. (Thornton on Attorneys, sec. 863.) Among the cases to which we are referred is that of *People v. George*, 186 Ill. 122, [57 N. E. 804], which counsel (*amici curiae*) assure us is "practically on all-fours with the case at bar." From that decision we learn that Mr. George was disbarred, not only upon proof of charges showing that he had been con-

victed of a felony and thereafter pardoned, but also because after the pardon he had committed other acts of a criminal nature convincing the court that, notwithstanding the pardon, the accused did not possess a good moral character, and that he was not a proper person to retain his license to practice law. The question as to whether or not a record of conviction could be made the sole basis of such a charge and accepted as constituting the sole and conclusive ground for disbarment after the pardon had been granted, did not arise in that case. If that question had been presented, the decision very probably might have been in favor of the respondent. This is indicated by the fact that the court quoted with approval the decision of the supreme court of Maine in *Sanborn (Penobscot Bar) v. Kimball*, 64 Me. 146. There the charge was that the respondent was found guilty of dishonesty and bad faith toward clients in several instances, and there was a separate specification that the respondent "does not possess a good moral character," in that at a certain term of court he was convicted of the crime of forgery. As to this particular specification the respondent proved that he had received a pardon for the offense of which he had been convicted. The crime for which he was convicted and sentenced was the forgery of a deposition and caption thereto annexed. Relying upon *Ex parte Garland*, 4 Wall. 333, [18 L. Ed. 366], the court held that the effect of the pardon was not only to release the respondent from punishment, "but also to blot out the guilt thus incurred, so that in the eye of the law he is as innocent of that offense as if he had never committed it." But it was pointed out that the respondent, in his capacity as attorney, had done more than commit the forgery of which he was convicted, in that afterward he had offered the forged document as evidence in court. "The executive pardon affords the respondent no protection from the consequences which the law attaches to this offense. Pardon for one crime does not release a party from the penalties and disabilities consequent upon the commission of another. A pardon for forgery does not prevent a party from suffering the consequences attached to a conviction for adultery or larceny, nor blot out the guilt inseparable from such crimes and give their perpetrator a new character for chastity and honesty. The indictment upon which the respondent was convicted contains no count for a violation of his official oath or for a fraud upon the court.

The respondent's pardon for forgery can no more obliterate the stain of guilt for those offenses than the judgment in that case would be a bar to an indictment for their commission." It seems clear that if, as in the case at bar, the Kimball case had been one where it was sought to disbar the respondent solely upon the ground that he had been convicted of a felony, the subsequent pardon would have been recognized as a sufficient defense.

In *Scott v. State*, 6 Tex. Civ. App. 343, [25 S. W. 337], it was sought to obtain a judgment of disbarment founded upon article 226, Revised Statutes of Texas, reading thus: "No person convicted of a felony shall receive license as an attorney at law: or if licensed, any court of record in which such person may practice shall, on proof of a conviction of any felony, supersede his license and strike his name from the roll of attorneys." The plaintiff in error had been convicted of a felony but immediately thereafter pardoned by the Governor, several years before this proceeding was instituted against him. The court said: "We are of opinion that after he received an unconditional pardon the record of the felony conviction could no longer be used as a basis for the proceeding provided for in article 226. This record, when offered in evidence, was met with an unconditional pardon, and could not, therefore, properly be said to afford 'proof of a conviction of any felony.' Having been thus canceled, all its force as a felony conviction was taken away. A pardon falling short of this would not be a pardon, according to the judicial construction which that act of executive grace has received. (*Ex parte Garland*, 4 Wall. 344, [18 L. Ed. 366]; *Knote v. United States*, 95 U. S. 149, [24 L. Ed. 442], and cases there cited; *Young v. Young*, 61 Tex. 191.) Cases may be found holding that a pardon does not operate as a bar against a proceeding to strike an attorney from the rolls on account of the professional misconduct involved in the transaction which culminated in the conviction. (*Sanborn (Penobscot Bar) v. Kimball*, 64 Me. 140; *In re*, an attorney, 86 N. Y. 563.) In these cases the proceedings to disbar were not founded on statutes like ours, declaring the effect of a felony conviction, but upon facts showing professional misconduct. Where the proceeding, as in this case, depends alone upon the felony conviction, and that is wiped out by a pardon, the whole case falls."

In legal effect the case at bar comes within the rule, which we think is correctly stated in the Texas case. Notwithstanding that the respondent at one time stood convicted of a felony and that the record of conviction might have been used as the foundation for this proceeding while the judgment of conviction was in force, it is no longer possible, after the pardon, to disbar him by this statutory proceeding wherein, if it is maintainable at all, judgment must go against him without any opportunity to defend against any present imputation against his moral character. If those responsible for this prosecution believe, or have grounds for believing, that the respondent is not now a person of good moral character, or that he has committed any acts which should move the court in its discretion to disbar him at this time, those charges should be framed in such manner as will fairly test the respondent's rights by giving him a full opportunity to defend upon the merits.

The objections made by respondent are (as to the points discussed herein) sustained and the proceeding is dismissed.

James, J., and Shaw, J., concurred.

[Civ. No. 1539. Second Appellate District.—December 7, 1915.]

A. NOLTE, Appellant, v. BARBARA NOLTE, Respondent.

DIVORCE—RECORD ON APPEAL—AFFIDAVIT NOT PART OF JUDGMENT-ROLL.

On an appeal from an order setting aside a final decree of divorce, an affidavit in the transcript which appellant claims contains a statement of facts which led the lower court to make an order for *nunc pro tunc* entry of the interlocutory decree, which affidavit comes into the transcript under a certificate describing it as part of the judgment-roll, but which is not a part of the judgment-roll and does not appear to have been one of the papers used in connection with the order from which the appeal is taken, cannot be legally taken cognizance of.

1D.—SUFFICIENCY OF FACTS TO AUTHORIZE ORDER—PRESUMPTION.—Such defect is immaterial, since facts sufficient to satisfy the court may have existed and may have been shown to the court; and, since no appeal appears to have been taken from the judgment, it will be presumed that the court had before it facts sufficient to authorize

such order to the full extent that the order may legally be made under any circumstances.

ID.—JUDGMENT—ENTRY NUNC PRO TUNC.—While the power of a court over its records, in order to make them speak the truth, is fully recognized, and for that purpose errors or omissions in the entry of judgments may in some instances be corrected by entering them as of the date when rendered, the full effect of a *nunc pro tunc* order is limited so as to prevent results not contemplated by the law.

ID.—ENTRY OF INTERLOCUTORY DECREE NUNC PRO TUNC—VOID ENTRY OF FINAL DECREE.—Section 131 of the Civil Code contemplates that a final decree of divorce shall not be entered until after the expiration of the time within which an appeal may be taken from the interlocutory decree, nor during the pendency of such appeal if taken, and the entry of the interlocutory decree *nunc pro tunc* as of an earlier date does not affect the time prescribed within which an appeal may be taken; and the entry of a final decree within a week after the *actual* entry of the interlocutory decree *nunc pro tunc* as of a date one year previous is void, and may be vacated on motion of either party or of the court.

APPEAL from an order of the Superior Court of Los Angeles County vacating a final decree of divorce. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

H. H. Appel, and E. J. Dennison, for Appellant.

Charles W. Hoag, for Respondent.

CONREY, P. J.—Appeal by the plaintiff from an order vacating a final decree of divorce. On the twenty-eighth day of June, 1909, the case was tried and submitted to the court for decision. On June 28, 1910, an interlocutory decree was signed, together with an order "that the foregoing decree be entered *nunc pro tunc* as of June 28, 1909." This decree was entered July 5, 1910, as of June 28, 1909. On July 1, 1910, a final decree of divorce, purporting to be based upon such interlocutory decree entered *nunc pro tunc* as aforesaid, was signed by the judge. This decree was entered July 6, 1910. On the twelfth day of November, 1912, the court, upon its own motion, entered an order setting aside and vacating said final decree "because it was entered within a week after the actual entry of interlocutory decree of divorce." It is from this last mentioned order that the appeal is taken.

We find in the transcript an affidavit made by the plaintiff's attorney and sworn to on July 1, 1910, which the appellant claims contains a statement of the facts which led the court to make its order for *nunc pro tunc* entry of the interlocutory decree. This affidavit comes into the transcript under a certificate describing it as part of the judgment-roll. As it is not part of the judgment-roll and does not appear to have been one of the papers used in connection with the order from which the appeal is taken, we find no legal ground for taking cognizance of the contents of such affidavit. (Code Civ. Proc., sec. 951.) But this defect is immaterial, since facts sufficient to satisfy the court may have existed and may have been shown to the court; and since no appeal appears to have been taken from the judgment, it will be assumed that the court had before it facts sufficient to authorize such order to the full extent that the order could legally be made under any circumstances. Therefore, if, as counsel claims, an interlocutory decree in like form as the one that was entered in 1910 had been signed on June 28, 1909, by the judge who tried the case, and had been delivered to the clerk for filing, and if without filing or entry of such decree the same was lost by the clerk, these would be circumstances strongly appealing to the court in the exercise of its judgment favorably to the request of the plaintiff that the decree be entered as of the date of trial.

It is well established that where a judgment has been rendered and its entry omitted, it may be subsequently entered, and, if justice requires, may be made to take effect *nunc pro tunc* as of the date when it was actually made. (*In re Skerrett*, 80 Cal. 62, [22 Pac. 85]; *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 480, [41 Pac. 328]; *Marshall v. Taylor*, 97 Cal. 426, [32 Pac. 515], and many other cases.)

The order setting aside the final decree is not necessarily based upon lack of authority of the court to enter its interlocutory decree *nunc pro tunc* as of the date when it was rendered, but is based upon the ground that the court has no power to enter a final decree until the expiration of one year after the *actual* entry of the interlocutory decree. "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, . . . but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall

not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. . . ." (Civ. Code, sec. 132.) During the period of time covered by the proceedings under review herein it was provided in section 131 of the Civil Code that from an interlocutory judgment in a divorce action "an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final." In *Spence v. Troutt*, 133 Cal. 605, [65 Pac. 1083], it was held that the time allowed for an appeal commences to run from the time of the actual entry of the judgment. The court said: "It hardly requires argument or authority to establish the proposition that a court cannot by antedating an order, or the entry of it, cut off the right of a party to move for a new trial, to move to set the judgment aside, or to appeal. These rights, given by the Code of Civil Procedure, cannot be lost to a party by such action, whether the effect was designed or not. The test as to the period in which the party must act in order to get relief from an order or judgment against him must be, whether he could have obtained the desired relief (on a proper showing) before the *nunc pro tunc* order was made." In *Baum v. Roper*, 1 Cal. App. 435, [82 Pac. 390], it was said that, while it is true that an appeal will not lie from a judgment until it has been entered, the judgment in other respects gets its force and vitality from its rendition and not from its entry; that the rendition of the judgment is the judicial act of the court and its entry is the ministerial act of the clerk. So it was held in *Los Angeles County Bank v. Raynor*, 61 Cal. 145, that it was not necessary that the judgment should have been entered when the execution was issued. "The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (Code Civ. Proc., sec. 681), or in which the judgment may be enforced (Code Civ. Proc., sec. 685); and the other for the purpose of creating a lien by the judgment upon the real property of the debtor. (Code Civ. Proc., sec. 671.)"

The effect of these decisions is that, while the power of a court over its records, in order to make them speak the truth, is fully recognized, and for that purpose errors or omissions in

the entry of judgments may in some instances be corrected by entering them as of the date when rendered, the full effect of the *nunc pro tunc* order is limited so as to prevent results not contemplated by the law. There seems to be no reason why such limitation should not apply to the established time when the right to a final judgment of divorce will accrue, in the same manner that it applies to the time when an appeal may be taken, or to any other of the instances above noted. We do not doubt that these were the considerations which led the supreme court to hold, in *Grannis v. Superior Court*, 146 Cal. 245, [106 Am. St. Rep. 23, 79 Pac. 891], that the provisions of sections 131 and 132 of the Civil Code, "interpreted in the light of previous legislation and decisions and the purpose to be accomplished by the law, are clearly to be understood as a limitation on the power of the court in the matter, and as intended to forbid the entry of a final judgment until after the prescribed period. The law can only be made effectual for the accomplishment of its object by holding that any final judgment purporting to grant the divorce is absolutely void if thus prematurely entered." While in that case the court was not considering the power to make a *nunc pro tunc* entry of a decree, or the limitations on the effect of such entry, we are satisfied that the interpretation there placed upon the code provisions necessarily leads to the conclusion that a final decree of divorce could not be entered until one year after the actual entry of the interlocutory decree. The language of section 131 contemplates that a final decree shall not be entered until after expiration of the time in which an appeal may be taken from the interlocutory decree, nor during the pendency of such appeal if taken. As we have seen, the entry of the interlocutory decree *nunc pro tunc* as of an earlier date does not affect the time prescribed within which an appeal may be taken. The result is that in this case, as in the *Grannis* case, "the judgment in question, being wholly void as a final judgment granting an immediate divorce, it was within the power of the superior court at any time, on motion of either party, or of its own motion, to declare it null, in so far as it purported to be of such effect."

That we have correctly understood the intended effect of the supreme court's decision in the *Grannis* case further appears from the fact that on the same date, in *Claudius v. Melvin*, 146 Cal. 257, [79 Pac. 897], the same court said:

"We think the defendant is correct in the position that the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment, and not from any theoretical *nunc pro tunc* date of entry."

The order is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1578. Second Appellate District.—December 7, 1915.]

D. E. KEITH, Appellant, v. W. A. HAMMEL, Sheriff of Los Angeles County, Respondent.

ACTION TO COMPEL SHERIFF TO RETURN FEES TO COUNTY—PLEADING—SUFFICIENCY OF PETITION.—In a proceeding for a writ of *mandamus* to compel the sheriff of Los Angeles County to pay into the county treasury all fees collected by him as such sheriff between certain dates, for the performance of official duties pertaining to that office, an allegation in the petition that the respondent as sheriff, between the dates specified, "collected and received and appropriated to his own use, the sum of \$3,000.00 as fees belonging to Los Angeles County for the performance of his services as sheriff of Los Angeles County during said time," is sufficient as against a general demurrer.

ID.—CONDUCT OF ACTION FOR COUNTY—CONTROL BY PUBLIC OFFICERS.—The general effect of the provisions of the charter of Los Angeles County and of the statutes is, not only that the conduct of actions in which the county is a party is committed to the charge and control of public officers, but it is the intention (in harmony with long-established principles) that the county shall be a party to actions and proceedings wherein the county is concerned.

ID.—ACTION BY TAXPAYER—WHEN UNAUTHORIZED.—A resident property owner and taxpayer in the county of Los Angeles has no right to maintain an action to compel the sheriff of the county to pay into the county treasury certain fees collected and alleged to have been wrongfully appropriated by him, in the absence of a showing that the proper county officers have refused to commence or prosecute such a proceeding for the protection of the county's interest.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

William H. Fuller, for Appellant.

Leon F. Moss, for Respondent.

CONREY, P. J.—*Mandamus*. The petitioner, a resident property owner and taxpayer in the county of Los Angeles, filed his petition in the superior court against the sheriff of Los Angeles County for a writ of *mandamus* to compel the respondent to pay into the county treasury all fees collected by him as such sheriff between the second day of June, 1913, and the thirty-first day of October, 1913, for the performance of official duties pertaining to that office. A demurrer to the petition for want of facts sufficient to constitute any ground for the relief demanded, was sustained and judgment was entered in favor of respondent. From that judgment the petitioner appeals.

Two principal objections among those relied upon by the respondent will be considered. These are: First, upon the merits, that the facts alleged do not show that the sheriff has received and retained any fees which he is under obligation to pay over to the county. Second, respondent claims that petitioner has not stated facts sufficient to establish his right to maintain the action, even though the demanded right exists in favor of the county.

The petition is so framed as to indicate that the pleader was intending to enforce the payment to the county of mileage and other compensation claimed by the sheriff under the charter of Los Angeles County and section 4290 of the Political Code. The claim of the sheriff that he was entitled to retain such moneys for his own use was determined in his favor on appeal to this court in *Los Angeles County v. Hammel*, 26 Cal. App. 580, [147 Pac. 983]. Appellant now concedes the points which were involved in that appeal, but he contends that since there are other fees provided by law which the sheriff of Los Angeles County must collect and pay into the county treasury (Pol. Code, secs. 4300b, 4300c), the petition herein is nevertheless broad enough to include those fees. Treating many of his allegations as surplusage irrelevant to his real case, he now says that the case includes, and was intended to include, all moneys collected by the sheriff in his official capacity. The petition states that the respondent as sheriff, between the dates specified, "collected and received

and appropriated to his own use, the sum of \$3,000 as fees belonging to Los Angeles County, for the performance of his services as sheriff of Los Angeles County during said time." This appears to be sufficient, and the allegation is good as against a general demurrer.

The law concerning the right of a taxpayer to maintain actions and proceedings to enforce public rights and protect public interests has been a subject of discussion in many decisions, but is also to some extent affected by statutory declaration. Section 526a of the Code of Civil Procedure provides for the maintenance of a taxpayer's action against public officers to obtain a judgment restraining and preventing certain described illegal expenditures, etc., of county or municipal funds. It also says: "This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer." The charter of Los Angeles County, in section 21 thereof (Stats. 1913, p. 1490), declares that "the county counsel . . . shall have exclusive charge and control of all civil actions and proceedings in which the county or any officer thereof, is concerned or is a party." Section 10 of the charter states that the board of supervisors shall have all the jurisdiction and power "which are now or which may hereafter be granted by the constitution and laws of the state of California, or by this charter." Under section 4041 of the Political Code, subdivision 16, boards of supervisors are given jurisdiction and power to direct and control the prosecution and defense of all suits to which the county is a party. The general effect of these provisions of charter and statute seems to be, not only that the conduct of actions in which the county is a party is committed to the charge and control of public officers, but it further appears to be the intention (in harmony with long-established principles) that the county shall be a party to actions and proceedings wherein the county "is concerned." From the many decisions of the courts of this and other states dealing with this subject, we derive the principle that in the conduct of the ordinary business of a county or city, where the care and protection of the rights of the corporation have been committed to public officers, the primary right goes with the duty belonging to those officers to control the ordinary business of the corporation without the interference of private citizens, even though they be taxpayers. The exceptions which have been per-

mitted usually arise in those situations where an officer is threatening to act in excess of his authority, or refuses to perform an official duty, and there is no other officer or official body empowered to act on behalf of the public or of the corporation, to enforce their rights in the matter, or where it appears that the officers empowered to act refuse to perform their duty in that respect. Instances which illustrate the subject may be given; such as *Hyatt v. Allen*, 54 Cal. 353, *mandamus* by a taxpayer within an assessment district to compel county assessor to assess property subject to assessment; *Eby v. School Trustees*, 87 Cal. 166, [25 Pac. 240], *mandamus* to compel board of school trustees to comply with instructions of electors as to location of schoolhouse site; *Frederick v. City of San Luis Obispo*, 118 Cal. 391, [50 Pac. 661]; *mandamus* to require board of trustees to call an election on question of disincorporation of the city. All of these cases had to do with extraordinary situations and not with the conduct of the ordinary business of the corporation. In *Maxwell v. Board of Supervisors*, 53 Cal. 389, petitioner was permitted to maintain a proceeding for writ of review to the board of supervisors to review its action in entering into a contract for printing. This related to a matter within the ordinary scope of the business of the corporation, but the recalcitrant body was the controlling board of officers of the county, and the taxpayer's right in such a case is one arising out of the necessity of the situation, and is recognized for that reason. The principle which should control is very fully stated in *Dunn v. Long Beach Land & Water Co.*, 114 Cal. 605, [46 Pac. 607], wherein a resident of and property owner and taxpayer in the city of Long Beach sought to have canceled a certain judgment affecting the title to a street and to quiet the title of the city to the street. It was held, not only that the complaint did not state facts sufficient to constitute a cause of action, but also that the facts were not sufficient to justify the plaintiff in bringing the action. The court said: "The rule is that the municipality, through its governing body, has control of the property and general supervision over the ordinary business of the corporation; and there would be utter confusion in such matters if every citizen and taxpayer had the general right to control the judgment of such body or usurp the office. Where the thing in question is within the discretion of such body to do or not to do, the general rule is that then neither by *man-*

damus, quo warranto, or other judicial proceeding, can either the state or a private citizen question the action or nonaction of such body; nor in such cases can a private citizen rightfully undertake to do that which he thinks such body ought to do. It is only where performance of the thing requested is enjoined as a duty upon said governing body that such performance can be compelled, or that a private citizen can step into the place of such body and himself perform it. If, therefore, in the case at bar it was not a duty enjoined upon the board of trustees of the city of Long Beach to bring an action similar to this present action brought by appellant, then we need not discuss the general subject of the right of private citizens to maintain actions concerning municipal affairs—which right is founded to a great extent upon necessity, and the want of any other proper party plaintiff. And the proposition that it was a duty enjoined upon said trustees to bring such an action cannot be maintained.” Then, after further discussion and decision that there was no cause of action stated, the opinion closes as follows: “It cannot be rightfully said that the trustees now in office are not exercising a wise discretion by refusing, at the present time, to commence unnecessary and hazardous litigation.”

In the case at bar we are not called upon to consider whether the officers of Los Angeles County are exercising a wise discretion by refusing to commence an action against the sheriff to recover fees unlawfully retained by him, since there is no intimation that they have refused or neglected anything in that respect. The case to which we have referred, *County of Los Angeles v. Hammel*, shows that the officers of the county were diligent in seeking to recover from this same sheriff another class of funds to which they claimed that the county was legally entitled. If there is any further right of action against the sheriff, it is a right of action of the county which should be prosecuted by the county as a party plaintiff. In order to justify the petitioner in maintaining an action or proceeding, we think that it would be necessary for him to show that the officers who control those matters of litigation in which the county of Los Angeles is concerned have refused to commence or prosecute proceedings for the protection of the county's interests in this matter. In *Burr v. Board of Supervisors of Sacramento County*, 96 Cal. 219, [31 Pac. 38], it was held that where by statute it is made the duty of the district

attorney to institute suit in the name of the county for the recovery of money paid out without authority of law, the statute affords a plain, speedy and adequate remedy available to taxpayers by complaint to the district attorney, and that "to say the least," the interest of a taxpayer does not entitle him to bring suit in his own name until the district attorney has refused to perform the duty so enjoined on him.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1543. Second Appellate District.—December 8, 1915.]

JOHN LAPIQUE, Respondent, v. ALONZO MORRISON, Appellant.

EASEMENT—RIGHT OF WAY BY NECESSITY.—A right of way by necessity can only be claimed and held where it furnishes the only way by which access may be had to the property of the claimant.

ID.—RIGHT OF WAY—ADVERSE USER—CONTINUOUS USE.—While a right of way may be acquired by adverse possession, where it is so asserted the party claiming it must prove its continuous and uninterrupted use.

ID.—ADVERSE POSSESSION—TITLE OF UNITED STATES AND STATE UNAFFECTED BY.—Title by adverse possession cannot be asserted as against the ownership of the United States or of the state in lands which have not been patented.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. James W. Bartlett, Judge presiding.

The facts are stated in the opinion of the court.

Kendrick & Ardis, for Appellant.

J. Lapique, *in pro. per.*, and Haas & Dunnigan, for Respondent.

JAMES, J.—This action was commenced by Pierre Agoure, who claimed right to the use of a right of way for road purposes across the land of defendant. By the allegations of

the complaint facts are alleged which support both a cause of action to assert the right in the plaintiff to the use of the road, as of necessity, as well as the right by adverse user; at least, such is the general complexion of the allegations contained in the complaint. In the prayer it is demanded that defendant be enjoined from interfering with the plaintiff's use of the alleged right of way, and also that the interest of plaintiff therein be quieted as against the defendant. After trial was had and judgment rendered in favor of the plaintiff, an order was made substituting the respondent herein as party plaintiff, the order of the court in that behalf reciting that it appeared that the estate, right, title, and interest in the action had been assigned by the plaintiff to the respondent. No point is made as to the regularity of this order.

We think the assignability of the *cause of action* in this particular case might well be questioned, but as the point is not raised, we are not called upon to determine that matter. However, we think that the judgment and order denying the defendant a new trial, both of which were appealed from, must be reversed. The evidence is not sufficient to support either. In the first place, the findings of the court are not such as to establish facts in support of the claim that a right of way existed in Agoure's favor as of necessity. The only suggestion in that direction is the statement in the findings that the roadway "is necessary to the reasonable enjoyment and use of plaintiff's said lands." It is well established that a right of way by necessity can only be claimed and held where it furnishes the only way by which access may be had to the property of the claimant. "The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. It will not exist where a man can get to his property through his own land. That the way over his own land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only where there is no way through his own land that a grantee can claim a right over that of his grantor. It must appear that the grantee has no other way." (*Kripp v. Curtis*, 71 Cal. 62, [11 Pac. 879].) The relation of grantor and grantee did not exist as between Agoure and this defendant, but even though such had been their relation, the facts found by the court do not establish the most material thing, to wit, that the plaintiff could not obtain access to his property except by use of

the right of way claimed. Turning to the evidence, we find that the facts shown do not establish any such condition. It appears that for many years prior to the year 1903, Agoure and other persons had driven across the land now owned by the defendant in order to reach a certain tract composed of fifteen thousand acres held by Agoure. All of this land was in a hilly region, and it was more convenient for Agoure to cross the land of defendant and the former occupants thereof than it was to travel by a different route. There was direct testimony of a hill route leading out from Agoure's land to the county road, which, however, it was stated was so rough as to make it difficult to transport any load there across. But it was nowhere shown that by the expenditure of some money and labor—perhaps a considerable amount of both—this hill route could not have been converted into a roadway of practicable grade and width. So it is very clear that no ground existed upon which Agoure or the plaintiff could assert legal necessity for the right of way as claimed. It appears that the plaintiff relied further, and the trial judge evidently sustained his claim in that regard, upon the fact that he had made use of the road for a long period of years. The court found that the right of way had been used for a period of more than five years prior to the commencement of the action. Easement rights may be so acquired, but where they are asserted, the party claiming them must prove an uninterrupted use of the right of way. Title to the land now owned by the defendant was held by the government of the United States up to the year 1903, when a patent was issued by which such title was divested. Since the year 1903, the evidence showed that this roadway had been plowed over and grain had grown up at times in the tracks. There was testimony for the defendant, which was uncontradicted, that haystacks had been placed across the roadway subsequent to the year 1903. The period included within that which will give title by adverse possession cannot commence to run at any time as against the ownership of the United States or of the state. (*O'Connor v. Fogle*, 63 Cal. 9, 11.) So, under the facts disclosed by the record, no claim by adverse user could have been raised prior to the year 1903, nor until five years had elapsed after issuance of patent to the defendant's land. During the latter period, we think the evidence clearly shows that the use which Agoure made of the right of way was not

continuous and uninterrupted; it was more in the nature of a user by permission. The country there was largely open and uncultivated. It was hilly land, as above stated, and persons generally having occasion to travel in that region adopted whatever route might appear to be the shortest, which they were allowed to do as a matter of accommodation by the land owners. The defendant could hardly have been placed upon notice, under the circumstances, that Agoure expected, because of the permission accorded him, to base a claim to easement rights in the roadway; for his general conduct was not such as to indicate his determination so to do. If he had intended to insist upon such a claim, his acts, as they are generally described by the testimony, and considering the practice adopted by travelers in that sparsely settled country, do not sufficiently so indicate. On this point, see *Clarke v. Clarke*, 133 Cal. 667, 670, [66 Pac. 10].

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1762. Second Appellate District.—December 8, 1915.]

THOMAS COMMINS, Trustee of Canadian Crude Oil Company, Limited (a Corporation), a Bankrupt, Appellant,
v. GUARANTY OIL COMPANY (a Corporation),
Respondent.

NONSUIT—ORDER FOR FINAL—ENTRY IN MINUTES—CONSTRUCTION OF SECTION 581, CODE OF CIVIL PROCEDURE—APPEAL—Since the amendment of 1897 to section 581 of the Code of Civil Procedure, the entry of an order granting a nonsuit in the minutes of the court is sufficient, and it need not be entered in the judgment-book at all; and such order so entered is a final judgment in the sense used in section 939 of the Code of Civil Procedure, providing for appeals.

ID.—LEASE—AGREEMENT FOR QUIET POSSESSION—ACTION TO QUIET TITLE—ABANDONMENT OF POSSESSION—ACTION FOR DAMAGES.—Where a lease of land for the development of oil provided that the lessor should protect the lessee against the claim of any party in any contest arising over the ownership, this provision shows that the lessee did not rely upon any implied covenant for quiet possession, and the latter was not justified in vacating the property be-

cause suit was brought by a third party to quiet title, and in an action for damages against the lessor to assert the claim that he was evicted thereby,—it not being shown that plaintiff's possession was the subject of a direct attack or interference, and there being no showing of any breach of the express agreement to protect the plaintiff against claims of ownership.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Collier & Clark, for Appellant.

Weaver, McCracken & McKee, for Respondent.

JAMES, J.—The plaintiff in this action, at the conclusion of the testimony introduced in support of his main case, was nonsuited. An appeal was taken from the order granting the motion of nonsuit, the record of which order or judgment appeared only in the minutes of the court.

It is first claimed by the respondent that the order granting the motion for a nonsuit, not being followed by a formal judgment of dismissal, was not a final judgment in the sense that that term is used in section 939 of the Code of Civil Procedure, providing for appeals. Section 581 of the Code of Civil Procedure provides that: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: . . . 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissals mentioned in subdivisions . . . and 5 of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered, . . ." In the case of *Kimble v. Conway*, 69 Cal. 71, [10 Pac. 189], it was held that no appeal was allowed from an order granting a motion for a nonsuit; nor from a judgment of nonsuit. In that case, however, it was not finally affirmed that a judgment of nonsuit might not, by being entered in the judgment-book, become a final judgment from which an appeal might be taken. However, at the time that decision was rendered section 581 did not contain the provision which was inserted in 1897, making an entry upon the minutes of the court of the orders or judgments sufficient for all purposes. It would seem, under the present state of the law,

that none of the orders or judgments provided to be made by section 581 of the Code of Civil Procedure need be entered in the judgment-book at all or appear in any record except that containing the minutes of the court. This conclusion is sustained by the decisions of *Matthai v. Kennedy*, 148 Cal. 699, [84 Pac. 37], and *Pacific Paving Co. v. Vizelech*, 141 Cal. 4, [74 Pac. 352]. We do not believe that a formal judgment of dismissal must follow the order or judgment of nonsuit, for the judgment of nonsuit in itself constitutes a dismissal of the action. It seems clearly to have been so considered in defining it in section 581 of the Code of Civil Procedure, which refers particularly to dismissals or the discontinuing of actions.

The motion for a judgment of nonsuit was properly granted, in our opinion, because the plaintiff's evidence did not establish his right to the relief sought. Thomas Commins, the plaintiff, appears as the trustee of the Canadian Crude Oil Company, a bankrupt, and hereinafter, for brevity's sake, we will refer to that corporation as the plaintiff. The evidence introduced on behalf of the plaintiff showed that the defendant, in April, 1911, entered into an agreement with the plaintiff whereby the defendant let to the plaintiff, for a period of twenty years, twenty acres of land in Kern County, California. Conditions of the agreement of lease provided that the plaintiff should develop oil on the land and render unto the defendant a certain proportion of the gross amount of the product in payment for such use. The plaintiff took possession of the land, proceeded with the work of developing oil thereon, and continued in that possession until November 1, 1911, when it abandoned the property. The abandonment was made because of an alleged eviction suffered at the hands of the owner of paramount title. This suit was brought to recover as damages all of the money expended upon the property (amounting to more than thirty-five thousand dollars), together with other sums claimed to have been laid out incidental to the making of the contract engagement. The evidence showed that about the middle of the year 1910 the defendant had contracted with the Lucky Boy Oil Company to purchase a large tract of land from the latter, of which the twenty acres so leased to plaintiff were a part; that the contract of purchase provided for installment payments to be made; that prior to the making of the lease to plaintiff, de-

defendant was in default under its contract of purchase, and that in June following the making of the plaintiff's lease, the Lucky Boy Oil Company brought a suit to quiet its title as against the contract of purchase held by the defendant. What became of this suit to quiet title cannot be told from the record. It is suggested in respondent's brief that it was dismissed, but the testimony of the attorney for the Lucky Boy Oil Company was to the effect that at the time of this trial the action was still pending and untried. It is the contention of the plaintiff that the evidence was sufficient to show that it entered upon the property under a covenant of quiet possession, and that when the action to quiet title was commenced and it was made to appear that the Lucky Boy Oil Company possessed the paramount title and right to possession, an eviction was worked which entitled plaintiff to its damages. Very important to a consideration of this question is a certain term of the lease made by the defendant with the plaintiff. It was therein provided as follows: "The first party (the defendant) agrees to protect the second party against the claims of any party or parties, should any contests ever arise as to the ownership of the same." By this term in the agreement it may be assumed that the parties considered the matter of possible claims or contests arising to disturb the possession of the lessee. Nowhere in the complaint is it stated or intimated that any fraud was practiced upon the plaintiff by the defendant, and the evidence does not show that any false representations were made as to the quality of defendant's title to the land. The situation was, as expressed by the evidence, that the plaintiff was willing to accept the lease made to it by the defendant, resting for its security upon that term of the agreement which made the lessor bound to protect the lessee in possession against the claims of other persons. Clearly, it would seem to follow by every fair inference that the plaintiff was not relying upon any implied covenants, but rather upon the specific and express terms of the agreement held by it. Under such a condition of the contract and the evidence, was the plaintiff justified in vacating the property after suit was brought to quiet title and assert the claim that it was evicted thereby? We think not. It is not shown but that the defendant at the time of this trial still possessed at least an equitable interest in the land, and it was not shown that it would not, or could not, in some way protest the pos-

session of its tenant. This possession had not been the subject of direct attack or interference, for it was shown that, notwithstanding the suit to quiet title of the Lucky Boy Oil Company was brought in June, 1911, the plaintiff remained in possession and continued to operate the property until November of the same year. One of its managing officers, when asked whether it was not a fact that work was stopped because of the lack of funds, responded in the affirmative. There are authorities holding that, even conceding an eviction of the tenant might have followed the bringing of the action to quiet title by the owner of the paramount title, the right to take advantage of such eviction may be waived by the tenant remaining in possession. However, our conclusions do not involve any application of the holding made by such decisions. Respondent has all along contended that the agreement which we have called a lease did not amount to such, but we think that it should properly be so termed. Any matter of mere form or designation which the parties may give to a document will not change its legal effect. In order that plaintiff might make a case sufficient against a motion for judgment of nonsuit, we think that it should have shown a breach of the express term of the contract which bound the defendant to protect it in possession. It voluntarily gave up possession; abandoned the property, and did that, too, without there being any judgment declaring the rights of the Lucky Boy Oil Company or foreclosing the interest of the defendant.

The view we have taken of the main question makes it unnecessary to consider or discuss the objections urged as to the admission and rejection of testimony.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 5, 1916.

[Civ. No. 1405. Third Appellate District.—December 11, 1915.]

JOSEPH F. BORGES, Appellant, v. E. C. HILLMAN et al.,
Respondents.

**ACTION UPON UNDERTAKING ON APPEAL—STAY OF EXECUTION OF ORDER
APPOINTING RECEIVER—AFFIRMANCE OF ORDER—RES ADJUDICATA.—**

In an action brought against the sureties upon an undertaking given to stay the execution of an order appointing a receiver pending an appeal therefrom, the affirmance of the order on appeal is *res adjudicata* as to the authority of the court to appoint the receiver.

ID.—PLEADING—PROPER PARTY PLAINTIFF.—The plaintiff in the main action, and not the receiver, is the proper party to maintain the action upon the undertaking.

ID.—TIME OF COMMENCEMENT OF ACTION.—An action upon such an undertaking is prematurely brought where at the time of its commencement the judgment in the main action has not become final by reason of the fact that the time to appeal therefrom has not expired.

ID.—RECOVERY UPON UNDERTAKING—COSTS ON APPEAL.—The fact that in such an action the plaintiff seeks relief for only the damage alleged to have been suffered by him from the moneys which came into the hands of the defendant in the main action pending the appeal from the order appointing the receiver, does not prevent him from maintaining an action in the proper forum upon the undertaking, in so far as it obligates the sureties to reimburse him for the costs on the appeal from the order appointing the receiver.

ID.—CONSTRUCTION OF UNDERTAKING.—The provision in such an undertaking, so far as it relates to the possession of the land involved and the collection of the rents, issues and profits thereof by the defendant, pending the decision on the appeal from the order appointing a receiver, "that if the said appellant does not make such payment within thirty days after the filing of the *remittitur* from the supreme court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties for the *said amount of said judgment*, together with interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal," means, in the absence of any pending appeal the disallowance of which by the appellate court would result in a judgment for any amount of money, that the sureties would not only guarantee the payment of the costs on the appeal from the order, but that, if a final judgment on the merits was eventually obtained by the plaintiff, they would indemnify him against any damage which might result to him by reason of the

fact that, pending the determination of the appeal from the order, the defendant was permitted to remain in possession of the property and to collect and retain the rent thereof.

APPEAL from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Clarence N. Riggins, for Appellant.

E. L. Webber, for Respondents.

HART, J.—This action was brought by the plaintiff against the defendants, as sureties upon a bond given to effectuate a stay pending an appeal from an order appointing a receiver made in a certain action wherein the plaintiff here was plaintiff and one Ida J. Dunham was the defendant.

The court sustained the demurrer of the defendants and allowed the plaintiff ten days within which to amend the complaint. The plaintiff declined to amend, and accordingly judgment passed for the defendants.

The plaintiff brings this appeal here from said judgment.

The facts as stated in the complaint are substantially as follows: The plaintiff here instituted an action in the superior court of Napa County against said Ida J. Dunham, for the purpose of obtaining a judgment adjudging and decreeing that he (said plaintiff) was the owner of a certain tract of land, embracing approximately 170 acres, said land being specifically described in the complaint, and that said Dunham "was holding the same, and had been holding said property ever since the 2d day of May, 1908, in trust, for the sole use and benefit of said plaintiff, and for an accounting of the rents and profits derived by her from said land since said date, and for judgment against her for any amount of money found by the court to be due plaintiff on account of said rents and profits derived by her from said lands."

After the filing of the complaint in said action of *Borges v. Dunham*, viz., on the eighteenth day of June, 1914, and at the trial of said action, but before the completion thereof, an order was made by the court before which it was pending, appointing one Malcolm Brown as receiver in said action to receive the rents, issues, and profits of the real property described

in the complaint in said action, and to hold the same during the pendency of said action, subject to the order of the court, and requiring said receiver to execute an undertaking, with two or more sureties, in the sum of five hundred dollars, "to the effect that he would faithfully discharge the duties of receiver in said action, and obey the orders of the court therein."

On the twenty-second day of June, 1914, said Malcolm Brown qualified as such receiver by taking and subscribing the required oath and executing the required undertaking, and said oath and bond were filed in the office of the county clerk on the succeeding day. Brown thereupon entered upon the discharge of his duties as said receiver, "and," so the complaint alleges, "continued therein until the giving of the bond on appeal hereinafter set out, and during the time that he was acting as said receiver, and prior to the giving of said last named bond, said Malcolm Brown collected the sum of \$300.00, rents of the real property above described."

On the twenty-third day of July, 1914, said Ida J. Dunham took an appeal from the order appointing said receiver, and for the purpose of securing a stay of the execution of said order, and enabling her to collect the rents and income of and from said real property pending said appeal, and also for the purpose of obtaining an order from said court requiring said receiver to pay and turn over to her (Dunham) all moneys then in his possession and collected by him as such receiver as for rents and income of and from said property during his incumbency in that office, the defendants in this action, E. C. and H. F. Hillman, executed a bond or undertaking, which is in the following language:

"Whereas, the defendant in the above entitled action has appealed to the supreme court of the state of California, from that certain order made and entered into against said defendant in said action, in the said superior court above mentioned, in favor of plaintiff, in which said order one Malcolm Brown was appointed a receiver of the property involved in said action, with full power to collect all of the rents and income from said property, which said order was made and entered into by said court on or about the eighteenth day of June, 1914;

"Now, Therefore, in consideration of the premises and of such appeal, we, the undersigned, E. C. Hillman and H. F.

Hillman, of the said county of Napa, state of California, do hereby jointly and severally undertake and promise, on the part of the said appellant, that the said appellant will pay all damages and costs which may be awarded against her on appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound; and,

“Whereas, the appellant herein is desirous of collecting the rents, profits, and income from the property involved in the above entitled action, and also of retaining that which has heretofore been collected by the receiver in the above entitled cause, we, the undersigned, residents of the county of Napa, state of California, do in consideration thereof, and of the premises, jointly and severally promise and acknowledge ourselves jointly and severally bound in the sum of one thousand (\$1,000.00) dollars, gold coin of the United States, that if the said order appealed from, or any part thereof be affirmed, or the appeal dismissed, or if the said appellant commit or suffer to be committed any waste thereon or in said real property involved in the above cause, that the appellant will pay in United States gold coin a reasonable amount for the value of the use and occupation of the property, together with all rents collected by said appellant during the occupancy of said premises by said appellant, and all damages and costs which may be awarded against the appellant herein upon this appeal. That if the said appellant does not make such payment within 30 days after the filing of the *remittitur* from the supreme court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties, for the said amount of said judgment, together with the interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal.”

Upon the filing of said bond, the court made an order directing and requiring the receiver to turn over to said Dunham (the appellant in said action) all moneys in his possession as such receiver and so collected by him as rent growing out of said real property since his appointment as receiver, and further “instructing said receiver to refrain from collecting any further rents from said real property pending said appeal from said order, and the said appellant thereafter, and in consideration of the giving of said bond, collected the rents

of said real property pending the final determination of said appeal, and prior to the making and entry of the judgment in said action as hereinafter alleged, and in consequence and consideration of the giving of said bond by these defendants, the said receiver paid to said appellant the sum of \$239.00 collected by him as rent of said real property since his appointment as said receiver, and the said appellant collected additional rents of said real property in the total sum, as plaintiff is informed and therefore alleges, of \$600.00, making \$839.00 in all."

On the eleventh day of November, 1914, the action of the plaintiff here against Ida J. Dunham having been tried, judgment was rendered and entered adjudging that, since the second day of May, 1908, said Dunham held "and is holding" the land in dispute in trust, for the sole use and benefit of the said plaintiff, and awarding to the said plaintiff against said Dunham the sum of \$2,379.62, on account of rents, issues, and profits coming into her possession from said real property, said sum including "the \$239.00 so paid to Ida J. Dunham by said receiver and \$300.00 of the \$600.00 collected by her pending said appeal from said order appointing a receiver as above alleged."

"Thereafter, and on the 29th day of December, 1914, a judgment was duly made and entered in the supreme court of the state of California in the matter of said appeal from said order appointing said receiver, whereby said order was affirmed, and that the *remittitur* thereon was thereafter issued by the clerk of said supreme court, and was filed in the above entitled superior court on the first day of February, 1915."

The demurrer objected to the complaint upon the grounds of misjoinder of parties defendant, the alleged incapacity of the plaintiff to maintain this action, that the court has no jurisdiction of the persons of the defendants, nor the subject of this action, for certain specified reasons, that the complaint is uncertain in specified particulars, and that there is a non-joinder of parties defendant in that Malcolm Brown, as receiver, "is not made a party plaintiff to this action."

Among the specific points made by the respondents in support of the judgment is that the court was without authority to appoint a receiver in the action of *Borges v. Dunham*, and that, therefore, the appellant cannot maintain the present action, because, as counsel states the proposition, "the order ap-

pointing a receiver was void and being void the bond must fail." But a review of this question by this court in this action is foreclosed by the decision of the supreme court affirming the order appointing the receiver concerned here. (*Borges v. Dunham*, 169 Cal. 83, [145 Pac. 1011].) While it is true that the record on appeal from said order was such as to preclude a review of the merits of the action of the court in making it, and the decision was, therefore, made to rest on the legal presumption of the due regularity of the proceeding culminating in the making of the order, yet the affirmance of the order involves a conclusive determination of the question, and is consequently *res adjudicata*.

The defendants further contend, however, that the plaintiff has no capacity to maintain this action, and that the same was prematurely brought. The first of these objections to the action is founded upon the proposition that the judgment in the main action not having become final at the time the present action was instituted, and the court not having discharged the receiver, the latter is the proper and necessary party to bring and maintain this action, inasmuch as he is entitled, under the order appointing him the receiver, to the exclusive possession and custody of all the rents, issues, and profits accruing from the property in dispute in said action from the time he was so appointed.

But we are unable to perceive how the receiver may be held to be authorized to maintain an action on the undertaking here declared upon. The undertaking does not run to the receiver, but to the plaintiff. The action on the undertaking is not one to recover moneys from Mrs. Dunham, the defendant in the main action and the appellant from the order appointing a receiver; but its purpose is to recover for any damage resulting from the possession of the property and the collection of its rents, issues, and profits by Mrs. Dunham, and against which damage the defendants here undertook by their bond to indemnify the plaintiff. We cannot perceive wherein the receiver could claim any damage against the defendants here by reason of their undertaking.

We are of the opinion, however, that the point made by the defendants that this action was prematurely commenced is well taken.

This action was commenced on the twenty-fifth day of March, 1915, but at that time the judgment in the main action

had not become final, said judgment having been entered on the eleventh day of November, and, while it has not been made to appear whether or not an appeal has been taken therefrom, the right to appeal therefrom nevertheless existed for the period of six months from the time of the entry thereof, or, to be more specific, the time within which the defendant in said action was legally authorized to appeal from the judgment therein entered against her did not expire until the twelfth day of May, 1915. (Code Civ. Proc., sec. 939.) It follows that said action, within the contemplation of section 1049 of the Code of Civil Procedure, was still pending, after the entry of judgment therein, for at least the period of six months. The section just referred to provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

It is obvious that a judgment rendered and entered in an action cannot become final so long as the action is pending within the meaning of the foregoing section. (See *Naftzger v. Gregg*, 99 Cal. 83, [37 Am. St. Rep. 23, 33 Pac. 757]; *In re Blythe's Estate*, 99 Cal. 472, [34 Pac. 108]; *Story v. Story & I. Commercial Co.*, 100 Cal. 41, [34 Pac. 675]; *Brown v. Campbell*, 100 Cal. 635, 646, [38 Am. St. Rep. 314, 35 Pac. 433].)

Now, the bond upon which the present action is founded, it will be noted, imposes upon the defendants two several and distinct obligations, viz.: The one whereby they have bound themselves in the sum of three hundred dollars to indemnify the plaintiff in this action for the *costs on appeal*, and the other, whereby they have bound themselves in the sum of one thousand dollars to hold the plaintiff free from loss, in the event that he should obtain judgment in the main action against the defendant therein, by reason of the moneys collected by the latter pending the appeal from the order as rents, issues, and profits growing out of the land. Whether this view of the undertaking be correct or not must depend, of course, upon the intention of the sureties, and this proposition must in turn be determined by a construction of the instrument.

While the relief asked by the plaintiff in this action is confined or limited by the complaint to the damage alleged to have been suffered by the plaintiff by reason of the rents, etc., coming into the hands of Mrs. Dunham pending the appeal

from the order appointing a receiver, we may, nevertheless, express the opinion that the plaintiff is entitled to maintain an action in the proper forum upon the undertaking in so far as it obligates the defendants (sureties) to reimburse him for the costs on the appeal from said order. The receiver was appointed upon the application of the plaintiff, and, in the absence of a showing of an abuse of authority by the court in making the order of appointment, the presumption is that the appointment of a receiver was in all respects proper. The plaintiff was required, of course, to defend, on the appeal from the order appointing the receiver, the action of the trial court in that regard. He was necessarily the respondent in that appeal and, said order having been affirmed on appeal, he is entitled to be reimbursed by the appealing party—the party vanquished on the appeal—for the necessary or legal costs incurred by him in so defending the order.

But, as stated, our conclusion is that this action upon that part of the undertaking referred to is premature, or, in other words, that the plaintiff was not, at the time of the commencement of the present action, legally authorized to maintain it. The conclusion thus declared is inspired by the conviction, based upon a construction of the undertaking by the light of all the circumstances surrounding its execution, that it was not the intention that the obligation of the undertaking upon which the plaintiff wholly relies for a recovery was to be discharged until there had been a judgment entered in favor of the plaintiff *and the same had become final*.

At the time of the execution of the undertaking the trial on the merits had not been completed, and consequently no judgment entered for the plaintiff. The issue submitted by the plaintiff by his complaint was whether the legal title to the land in dispute had been and was held by the defendant in trust for his benefit. The defendant answered the complaint denying specifically its allegations, and with her answer filed a cross-complaint in which she prayed for a decree quieting her title to the property described in the complaint. After issue joined, the plaintiff, upon notice duly given, applied to the trial court for an order for the appointment of a receiver to receive the rents, issues, and profits of the real property in controversy. The time for hearing the application was fixed for the day on which the action had been set down for trial, and, after taking some testimony, the court made

the order appointing a receiver. (*Borges v. Dunham*, 169 Cal. 83, [145 Pac. 1011].) The question then at issue at the time the order for the appointment of a receiver was made, was whether the plaintiff was entitled to a cancellation of his deed to the property to the defendant and the property declared to be held in trust by the latter for the benefit of the former, or whether both the legal and equitable title to the property was in the defendant and she entitled to a decree quieting said title. It hence follows that the plaintiff, at the time of the appointment of the receiver and at the time of the execution of the undertaking, was not entitled to the possession of the property, nor to the rents, issues, and profits thereof.

Now, it will be noted that the undertaking, so far as it relates to the possession of the land and the collection of the rents, issues, and profits thereof by Mrs. Dunham, pending the decision on the appeal from the order appointing the receiver, provided, among other things, as follows: "That if the said appellant does not make such payment within 30 days after the filing of the *remittitur* from the supreme court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties for the *said amount of said judgment*, together with interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal."

The meaning of the foregoing language is, it must be conceded, very obscure; but, considering that, at the time of the execution of the undertaking, there was pending no appeal the disallowance of which by the supreme or appellate court would result in a judgment for any amount of money or a money judgment of any sort, we take it that what the sureties meant by that language is this: That they would not only guarantee the payment of the costs on appeal from the order appointing a receiver, but that, if a final judgment on the merits was eventually obtained by the plaintiff, they would indemnify him against any damage which might result to him by reason of the fact that, pending the determination of the appeal from the order, the defendant, Mrs. Dunham, was permitted to remain in possession of the property and to collect and retain the rents, issues, and profits thereof. This, it appears to us, is the correct interpretation of the language of

the undertaking, above quoted, and of the intention of the sureties; for the only appeal actually pending when the undertaking was made and delivered was the appeal from the order appointing a receiver, and obviously there could result from said appeal no judgment other than one affirming or reversing the order, except in so far as the awarding of costs on said appeal may be treated as a judgment for an amount of money, and this we do not think can be truly said to be the case. Besides, as to the costs on said appeal, the undertaking, as before suggested, makes a separate and distinct provision.

The demurrer was, in our opinion, properly sustained, and the judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1769. Second Appellate District.—December 18, 1915.]

THE BANK OF BAKERSFIELD (a Corporation), Plaintiff, v. SARAH L. CONNER, as Executrix, etc., Respondent; G. J. PLANZ, Appellant.

CONTRACT—SALE OF BANK STOCK—PAYMENT.—Where an agreement for the sale and delivery of a certain number of shares of the capital stock of a banking corporation provides for the sale and delivery of the stock upon payment of the price on or before a specified date, and that payment shall be deemed to be sufficiently made to the seller by payment of the price to the bank for account of the seller, and that the stock shall upon such payment be delivered to the purchaser on demand, the delivery by the seller to the bank of his certified check for such amount payable to the bank, or bearer, constitutes payment for the stock under the terms of the contract, and does not amount to merely a tender of payment conditioned upon delivery of the shares of stock.

ID.—ACTION OF INTERPLEADER—EVIDENCE—FORM OF CHECK.—In an action of interpleader brought by the bank upon which the check was drawn to determine the rights of the parties thereto, it is not error to refuse to permit the maker of the check to testify why the word "bearer" was left on the check, or whether he intended that it should be left thereon at the time he made it.

ID.—OWNERSHIP OF CHECK—ELECTION OF PURCHASER.—Where the purchaser of the stock elects to continue his demand for performance

of the contract, he is not entitled to recall the payment made by him, notwithstanding that under the terms of the contract the obligation of the seller to deliver the stock and of the buyer to pay the price were concurrent conditions.

ID.—DELIVERY OF CHECK TO SELLER.—In such an action it is not prejudicial error to permit the cashier of the bank to which the check was delivered to testify that he delivered it to the seller on the same day that it was received by the bank.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

E. L. Foster, for Appellant.

C. C. Cowgill, and Peter A. Breen, for Respondent.

CONREY, P. J.—On July 21, 1910, the defendant G. J. Planz drew his check upon the Bank of Bakersfield for the sum of \$3,799.66 and caused it to be certified by that bank. The check was payable to the Kern Valley Bank or bearer. Immediately thereafter defendant Planz delivered the check to the Kern Valley Bank, and on the same day the cashier of that bank delivered the check, without indorsement, to C. L. Conner. Conner died at some time between September, 1910, and March, 1911, and the check in question came into the possession of the defendant Sarah L. Conner, as executrix of his last will and testament.

The plaintiff, the Bank of Bakersfield, filed its complaint herein, showing that it holds and has in its possession money deposited with it by defendant Planz sufficient to pay said check; but also that the defendant Planz gave notice and instruction to the plaintiff to refuse payment of the check, and that the defendant Conner, as executrix, has demanded payment thereof. The defendants were required to interplead herein for the determination of their adverse claims in the premises. A judgment having been entered in favor of the executrix, the defendant Planz has appealed therefrom and also from an order denying his motion for a new trial.

On July 21, 1908, an agreement in writing was entered into between C. L. Conner and one H. A. Blodget whereby, in consideration of the sum of five dollars in hand paid, Conner

agreed to sell and deliver to Blodget, his nominee or assigns, fifty shares of the capital stock of the Kern Valley Bank, a corporation, upon the payment of the sum of \$3,799.66 on or before July 21, 1909. It was agreed that upon payment to Conner on or before July 21, 1909, of the sum of \$281.45, the time for payment of said larger sum should thereby be extended to, and the delivery of said stock extended to July 21, 1910. It was agreed "that payment shall be deemed to be sufficiently made to said C. L. Conner by payment to the Kern Valley Bank for account of C. L. Conner of either of the sums above specified. And the said fifty (50) shares of said stock of the said Kern Valley Bank shall, upon payment made as hereinbefore provided, be delivered, on demand, to the said H. A. Blodget, his nominee or assignee, together with all dividends that may be declared and paid on said shares of stock during the life of this agreement." On July 21, 1909, Blodget paid the sum required for extending the time of final payment to July 21, 1910, and on July 19, 1910, sold, assigned, and transferred to G. J. Planz "all my right, title and interest in and to the within and foregoing contract and the capital stock of the Kern Valley Bank, viz.: Fifty (50) shares thereof, therein described." Thereafter Planz delivered his certified check as hereinabove stated.

The court found that said check was paid to the Kern Valley Bank for the account of C. L. Conner, and was accepted by that bank for the account of C. L. Conner as and in full payment of the purchase price of said fifty shares of stock. Under his specifications of insufficiency of the evidence to justify the findings, appellant claims that the evidence does not show his delivery of the check for the account of Conner or as payment on the contract, but claims that it was merely a tender of payment conditioned upon delivery of the shares of stock. In our opinion, the evidence fully justifies the finding as made. In his testimony defendant Planz himself said: "On July 21, 1910, under the contract, . . . I gave the Kern Valley Bank \$3,799.66. I paid it with my certified check on the Bank of Bakersfield." He further testified that on July 23, 1910, he demanded of Conner a transfer of the fifty shares of stock, and that Conner refused this demand and said that if Planz would deliver back to the Kern Valley Bank the receipt which that bank gave him, they would give him the money back or the check. On August 6,

1910, Planz filed a complaint in the superior court of Kern County against Conner and the Kern Valley Bank to enforce his demand for delivery to Planz of the fifty shares of stock to which he claimed to be entitled under the agreement with Blodget which had been assigned to him. In that complaint, verified under his oath, the plaintiff therein said that he had made the before mentioned payment of \$3,799.66 to the Kern Valley Bank for the account of C. L. Conner, and that "the said Kern Valley Bank, a corporation, received the sum of money for the account of C. L. Conner and now has the said sum of money in its possession and under its control for the account of C. L. Conner." The same statement was repeated in an amended complaint. To that complaint a demurrer was filed, and it appears that the action was pending without any other proceedings having been had therein at the time of the trial of the case now before us.

Defendant Planz in his answer states that the certified check was by mistake made out to bearer. At the trial he was asked to state why the word "bearer" was left on the check, or whether he intended that it should be left on the check at the time when he made it. The court sustained an objection that the question was irrelevant, incompetent, and immaterial, and an attempt to vary the terms of the written instrument by parol in the absence of any appropriate pleadings for reforming the instrument. It is now urged on this appeal that this ruling was erroneous, because it prevented appellant from showing that he was paying the money to the Kern Valley Bank and to no other person, and from showing that he had intended to strike out by drawing a line through the word "bearer." We think that the ruling was correct. Under the contract the Kern Valley Bank was agent of Conner for the purpose of receiving payment of the sum specified in the check. It is not claimed that the bank was aware of any mistake in the check or informed that it did not fully express the intention of the maker. Whether made payable to the order of the Kern Valley Bank or made payable to that bank or bearer, it was equally capable of being received and used for the purposes of the transaction.

The specifications of insufficiency of the evidence, although not in the usual form and in some instances perhaps not legally sufficient, will be considered as sufficient to raise the only other important question in the case, which is whether

the evidence justified the court in finding that Conner was the owner of the check and that it is now the property of the defendant Sarah L. Conner as executrix, etc. On this phase of the case it seems to us that appellant is relying upon propositions which are not applicable to the case as made by the record. He refers us to authorities holding that refusal to perform a contract constitutes a rescission. Assuming that in some instances this principle would be applicable, we have here a case in which the purchaser, even though he had a right to claim a rescission, elected to continue his demand for performance of the contract and bring an action for that purpose. Therefore appellant is unable to recall the payment made by him, even if, as he contends, under the terms of the contract the obligation of the seller to deliver the goods and of the buyer to pay the price were concurrent conditions. The shares of stock were identified, the price agreed upon was paid, and thereby Planz became the real owner of the shares. He was in a position which entitled him to compel the delivery to him of a certificate of stock. Certificates of corporation stock, it should be remembered, are not the shares, but are merely evidence of title.

Exception is taken to the court's ruling in allowing the cashier of the Kern Valley Bank to testify that on the same day when the certified check was received at that bank he delivered it to C. L. Conner. If this evidence was immaterial, the only reason would be that payment had been completed when the check came into the hands of the bank as Conner's agent. We see no error in the ruling, and at all events it would be without prejudice to any right of appellant.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on January 10, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 10, 1916.

[Civ. No. 1420. Third Appellate District.—December 13, 1915.]

B. F. LYNIP, Respondent, v. THE ALTURAS SCHOOL DISTRICT OF MODOC COUNTY et al., Appellants.

DISQUALIFICATION OF JUDGE—DISCLOSURE DURING TRIAL—TIMELY OBJECTION.—Where there is nothing on the face of the record in advance of the trial of an action to show that the judge was disqualified from trying the same, and such disqualification is first disclosed upon the cross-examination of the plaintiff, a motion thereupon made to change the place of trial is not too late.

ID.—ACTION BY BANKING CORPORATION—RELATIONSHIP OF JUDGE TO DIRECTOR—DISQUALIFICATION TO ACT.—A judge is disqualified from sitting or acting in an action in which a bank is the real party in interest, where his brother is a director of the bank, notwithstanding the fact that the action is brought in the name of a private individual.

ID.—CORPORATE CHARACTER OF BANK—TIME OF OBJECTION.—Where, in such a proceeding, it is intended to question the corporate character of the bank, such objection should be made at the time of the motion for change of place of trial, and when not so made the corporate character will be assumed.

ID.—STATUS OF DIRECTOR OF CORPORATION—OFFICER.—A director of a corporation is an officer within the meaning of subdivision 2 of section 170 of the Code of Civil Procedure, which provides that a judge is disqualified from sitting or acting in any action or proceedings where he is related to an officer of a corporation within the third degree, computed according to rules of law.

ID.—BUILDING CONTRACT—ABANDONMENT—ASSIGNMENT BY CONTRACTOR OF MONEY TO BECOME DUE—CONSTRUCTION OF INSTRUMENT.—An assignment by a contractor engaged in the construction of a school building of a specified sum of money "out of the twenty-five per cent of said contract price to be paid to me under said contract after the completion and acceptance of the building," operates solely upon the fund to become due and payable only upon the completion of the building, and not upon moneys becoming due and payable as the work progresses; and where the contractor abandons the contract before completion, the school trustees are not liable to the assignee for the amount of the assignment, under their indorsement on the contract recognizing the assignment and reciting an agreement to pay the sum named "out of the payment" to be made "at the time of completion and acceptance of said building."

ID.—GUARANTY OF PAYMENT TO ASSIGNEE—ABANDONMENT OF WORK—DISCHARGE OF GUARANTORS.—The execution by the school trustees, in addition to such indorsement, of a guaranty that the specified sum of money should be repaid to the assignee upon the completion

of the school building "out of the twenty-five per cent of the contract price of said building held back until the completion of said building," does not make them guarantors of the original obligation, and upon the abandonment of the contract by the contractor their liability became extinguished.

APPEAL from a judgment of the Superior Court of Modoc County. Clarence A. Raker, Judge.

The facts are stated in the opinion of the court.

Cornish & Robnett, for Appellant School Trustees.

C. S. Baldwin, for Appellant School District.

Jamison & Wylie, for Respondent.

BURNETT, J.—There is little, if any, controversy as to the facts involved herein. In the year 1911 one A. E. Pearson, as original contractor, was engaged in the construction of a grammar school building in the town of Alturas, Modoc County, under a written contract for the total price of \$20,350. Defendants Auble, Ballard, and Smith were the trustees of the school district. On or about November 18th of said year said Pearson made application to the plaintiff, as cashier of the First National Bank of Alturas, for a loan of four thousand dollars, to enable said Pearson to pay for labor and materials for the construction of said building. Plaintiff, acting for said bank, loaned Pearson said sum and took an assignment to the extent thereof of the last or final payment which might become due said Pearson after the completion of said building.

On cross-examination plaintiff testified that this was not a personal transaction of his, that it was a "bank affair," and that he was prosecuting the action for the bank. The record then shows the following: "Q. Who are the directors of your bank, that is, the First National Bank of Alturas? A. A. W. Toreson, D. C. Berry, A. B. Etes, H. R. Gaustad, John E. Raker, Uity McCabe, E. Van Loan, C. A. Estes, and myself. Q. You say that John E. Raker is a director? A. Yes. Q. Is that a brother of his Honor, Clarence A. Raker, who is presiding here? A. Yes, sir. Mr. Robnett: If your Honor please, it just now develops in this case that your Honor, under the code, will be disqualified to proceed, owing to the

fact that this action, although nominally brought in the name of B. F. Lynip, is in reality prosecuted by the First National Bank of Alturas, of which your brother, John E. Raker, is a director. I submit a motion at this time that your Honor is disqualified, and there should be a change of venue in this case. It did not appear on the face of the record before. Mr. Jamison: If your Honor please, I think it is out of the ordinary procedure. At this moment I am not prepared to take up and argue this matter. Usually, if any objection of this kind is made, it is made in the beginning, before the case has reached trial in any way, shape or form. Mr. Robnett: The record did not show on its face any disqualification. The other side had all the facts in their office and in their knowledge, and we had none of them. That is why the motion comes now. I simply submit the motion, and we are willing to proceed with the evidence and have the motion considered later. We make the motion now under our understanding of the law, and object to your Honor presiding at the trial. The Court: The motion is denied."

Section 170 of the Code of Civil Procedure provides: "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding. . . . 2. When he is related to either party, or to an officer of a corporation which is a party, . . . within the third degree, computed according to the rules of law." The section further provides that said disqualification may be waived in writing. That is the only method specified, and while, under certain circumstances, a party might be estopped to raise the question of disqualification, no such situation is presented here. Appellants made the objection as soon as they were apprised of the facts that seemed to bring the case within said inhibition of the statute. Upon no consideration of principle or authority do we think it should be held that the objection came too late or that appellants had waived the privilege. It will be noticed that the foregoing is the only objection made by respondent to the motion. Certain other considerations are suggested here, however, in attempted justification of the order denying said motion. One is that the bank is not a party to the suit. Nominally this is true, but said bank appears unquestionably to be the real party in interest. The statute should have, we think, no such narrow construction as is contended. Plaintiff could maintain the action only by virtue of section

369 of the Code of Civil Procedure—that is, as the trustee of an express trust, but the judgment rendered would affect particularly the interest of the bank for whose benefit the action was prosecuted, and that is the determinative factor. Neither can there be any doubt as to what bank was interested in the suit. The quotation already made leaves nothing to be desired as to this point.

The suggestion is made that it was not shown that the bank was a corporation. Such objection, if intended to be relied on, should have been made at the time. This would have been only fair to opposing counsel. Indeed, as we have seen, there was apparently no controversy as to the facts. It was assumed by all parties that the conditions existed that would make the rule applicable except that the application was made too late. But the point is made by appellants that it appears that it was a national bank, and since the law requires a national bank to be incorporated, we must assume that it was such corporation. If strict proof were required, we would probably not be justified in acting upon such assumption, but, under the peculiar circumstances here, we must hold that there was acquiescence in the existence of the facts implied in the statement of counsel for appellants.

The suggestion that a director is not an officer of the bank, urged strongly by respondent, is, we think, without any merit at all. An office in a corporation has been defined as “a position of trust or authority in the regular and continued employment of the corporation.” The duties of a director are familiar and need not be detailed, and it may be said that his position is of the highest “trust and authority” in connection with the affairs of the corporation. His authority is not only paramount, but the other executive officers are subject to his will for their appointment and tenure.

The question does not seem to have been considered many times by the courts, but there is authority for the position of appellants. In *United States v. Means*, 42 Fed. 603, it was held that directors of a national bank are “officers” within the meaning of Revised Statutes of the United States, section 5209, [5 Fed. Stats. Ann., p. 145; U. S. Comp. Stats. 1913, sec. 9772], which makes it a misdemeanor for bank officers to make false entries in any book, report, or statement of the bank, with intent to deceive any of its officers, the court saying: “As to the directors there is not the shade of doubtful

construction of this act. They are not only officers, but managers, of our national banks. They come within every sense and meaning of the word 'officer,' and are within the rule of the association of words in the act already referred to and of the decisions cited."

"In Laws 1875, C. 611, sec. 21, providing that 'if any certificate or report made or public notice given by an officer of a corporation shall be false in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof,' officers should be construed to include the directors of the corporation, for, in a strict sense, the directors of a corporation are its officers." (*Torbett v. Eaton*, 49 Hun, 209, [1 N. Y. Supp. 614]; *Brand v. Godwin*, 15 Daly, 456, [8 N. Y. Supp. 339, 9 N. Y. Supp. 743]; *Commonwealth v. Wyman*, 49 Mass. (8 Met.) 247.)

Our attention has not been called to any decision in this state directly in point but in the Civil Code, and in the case of *Sherwood v. Wallin*, 154 Cal. 735, [99 Pac. 191], it seems to be assumed that they are officers.

It appears to us so plain that we are not surprised that there has been little or no controversy concerning it.

Moreover, upon the merits, we think the decision was erroneous, judgment having been rendered for plaintiff after trial. The basis of the claim lies in an assignment made on November 18, 1911, by said Pearson as contractor aforesaid. The said assignment, after reciting the contract with said district and the advancement to said Pearson by B. F. Lynip of the sum of four thousand dollars to enable the former to pay for the material and labor on said building concludes as follows: "Therefore, I hereby assign, convey and set over unto the said B. F. Lynip the sum of four thousand dollars, out of the twenty-five per cent of said contract price, to be paid to me under said contract after the completion and acceptance of said building as aforesaid, and hereby authorize the said board of trustees to pay said sum out of said twenty-five per cent to said B. F. Lynip instead of to me, and to accept his receipt therefor in all respects as though said receipt was signed by me, hereby authorizing the said B. F. Lynip to receive and receipt for said sum of four thousand dollars out of said twenty-five per cent of said contract price, in my place and stead."

An assignment almost identical in form and between the same parties, involving the sum of \$430, executed November 6, 1911, nearly two weeks prior to the one before us, was thoroughly considered by this court in the case of *Lynip v. Alturas School Dist.*, 24 Cal. App. 426, [141 Pac. 835]. We may refer to said decision for a declaration of the facts connected with and of the principle that must control in the interpretation of the assignment herein. Therein it was held that the assignment operated "solely upon the fund to become due and payable only upon the completion of the building, not upon moneys becoming due and payable as the work progresses; and if the contractor abandons the contract before completion, the trustees are not liable to the assignee for the amount of the assignment, under their indorsement thereon recognizing the assignment and reciting an agreement to pay the sum named 'out of the payment' to be made 'at the time of completion and acceptance of said building.'"

There was in this case a similar indorsement made by the trustees, but there is this additional feature not found in the Lynip case, *supra*: Two days after said assignment was made it was again presented to the trustees of said district, and it then had attached to it a second page, containing the following guaranty: "We, the undersigned, in consideration of B. F. Lynip advancing to A. E. Pearson, the amount named in the assignment thereto attached, to-wit, the sum of four thousand dollars, for the purpose of paying for the labor performed, and the material furnished and used in the school building now being constructed by the said A. E. Pearson for the Alturas School District of Modoc County, California, do hereby guarantee that the said sum of \$4,000.00 so advanced by the said B. F. Lynip to the said A. E. Pearson, as aforesaid, shall be repaid to the said B. F. Lynip upon the completion of the said school building, out of the 25 per cent of the contract price of said building, held back until the completion of said building." On the same or the following day this was signed by two of the trustees, E. F. Auble and S. T. Ballard, and a day or two later by the other trustee, L. S. Smith.

It is by virtue of this guaranty that plaintiff sought to recover, contending that it was a guaranty of the original obligation—in other words, a guaranty that the debt would be paid. If such had been the intention of the parties, how-



ever, how easy to have so provided. If such was their intention, they were very unfortunate in the use of terms. The only reasonable construction of the instrument, it seems to us, embodies the conclusion that the trustees would recognize Lynip as being entitled to the last payment rather than Pearson. This necessarily implied that there would be a last payment due. They guaranteed, in other words, that the money should be repaid to Lynip out of a certain fund, to wit: "the 25 per cent of the contract price of said building, held back until the completion of the building." There never was any such fund, since Pearson abandoned the contract and the contract price was exhausted in the completion of the building by the trustees. It is to be observed that the trustees did not guarantee that Pearson would complete the building or that the twenty-five per cent would be due him when the building was completed, but the guaranty was virtually that effect would be given to the assignment to which, it may be repeated, it was attached and to which it refers and of which it was made an inseparable part.

This assignment was not the original obligation of the trustees nor of Pearson, but was collateral as a form of security. The original obligation was in the form of a promissory note signed by Pearson alone, and to secure its payment he made the assignment and the defendants guaranteed that they would recognize its operation in the distribution of said twenty-five per cent fund.

It is true that this construction probably deprives said guaranty of any legal value. The trustees had already indorsed on said assignment their acceptance, and they were thereby obligated to pay said fund to Lynip, but whatever may be the effect of said guaranty, the guarantors have a right to stand upon its terms.

The fact is, apparently, that the trustees, as individuals, guaranteed that they, as trustees of the district, would recognize Pearson's assignment and pay the money to his assignee instead of to him. But there was no default on the part of the trustees. They were not called upon to pay the money since the obligation never matured. As far as the guaranty is concerned, the trustees as such were the principals and they as individuals were guarantors. There having been no default on the part of the principals, it would follow that the guarantors were exonerated from liability.

Several cases are cited by respondent in support of his contention, but it will be observed that therein the liability of the guarantors was not limited as in the case before us. *Bagley v. Cohen*, 121 Cal. 604, [53 Pac. 1117], may be taken as an example. The contract was: "On or before sixty days I, E. H. Gould, do hereby agree to pay to F. S. Bagley, or order, out of the profits realized by me from my business of packing raisins at Malaga, during the present season, the sum of three hundred and ten dollars in gold coin of the United States of America." Prior to the delivery of this contract, and as a part of the same transaction, the defendant subscribed the following guaranty, which was written beneath the contract: "I, E. A. Cohen, do hereby guarantee the payment of the foregoing note in accordance with the conditions thereof." Within ten days after the execution of the foregoing instrument Gould sold and conveyed all his right, title, and interest in and to his business of packing raisins at Malaga and thereby prevented himself from realizing any profits out of said business. It was properly said by the supreme court that: "The contract of the defendants being a part of the same transaction with the contract of Gould, the two instruments make but a single contract on their part. (*Hazeltine v. Larco*, 7 Cal. 32.) Their guaranty that Gould would perform his contract was an original undertaking by them, and their liability as guarantors is commensurate with that of Gould. (Civ. Code, sec. 2808.) Their promise that he would perform his contract 'in accordance with the conditions thereof' made them absolutely liable for his failure to perform it when he should be so liable. (*Otis v. Hazeltine*, 27 Cal. 80.)" The defendants therein, as seen, guaranteed the performance of Gould's contract, and hence they were of course liable when he defaulted. The defendants here made no such guaranty of Pearson's performance, but guaranteed a payment in accordance with the terms of their contract with Pearson. The latter having defaulted, released them and also the guarantors.

We think the order and judgment should be reversed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 578. First Appellate District.—December 14, 1915.]

THE PEOPLE, Appellant, v. ANTONIO CARIDIS,
Respondent.

CRIMINAL LAW—GRAND LARCENY—LOTTERY TICKET—INSUFFICIENCY OF INFORMATION.—An information charging a defendant with the crime of grand larceny in stealing a lottery ticket fails to state a public offense, as such a ticket has no legitimate value except as the evidence of a debt due from an enterprise which is denounced by law and conducted in defiance thereof, and an allegation that the drawing had taken place prior to the alleged larceny and that the defendant had collected a large sum of money thereon, adds nothing to the value of the ticket.

ID. — SUBJECT MATTER OF LARCENY — PROPERTY HAVING VALUE. — It is essential to the commission of the crime of larceny that the property alleged to have been stolen have some value—intrinsic or relative—which, where grand larceny is charged and the property was not taken from the person of another, must exceed the sum of fifty dollars.

ID. — LARCENY OF WRITTEN INSTRUMENTS — CONSTRUCTION OF SECTION 492, PENAL CODE.—Section 492 of the Penal Code, which fixes the value in cases of the larceny of written instruments by providing that "if the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen," contemplates and controls the value to be placed only upon written instruments which create some legal right and constitute a subsisting and enforceable evidence of a debt.

ID.—ILLEGAL CONTRACT.—An obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value.

ID.—LOTTERY TICKET—PETIT LARCENY.—A lottery ticket, considered as a mere piece of paper, possesses perhaps some slight intrinsic value, which, however small, is sufficient to make a wrongful taking of it petit larceny.

APPEAL from an order of the Superior Court of the City and County of San Francisco allowing a demurrer to the information. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, Frank L. Guereña, and John H. Riordan, Deputies Attorney-General, for Appellant.

M. L. Choynski, and Joseph T. O'Connor, for Respondent.

LENNON, P. J.—The defendant in this case was, by an information filed in the superior court of the city and county of San Francisco, charged with the crime of grand larceny, alleged to have been committed as follows:

“The said Antonio Caridis on the 29th day of July, A. D. 1914, at the said City and County of San Francisco, State of California, did then and there willfully, unlawfully and feloniously steal, take and carry away one lottery ticket of the Original Nacional Company, No. 16235, that theretofore and on the 27th day of July, 1914, the said ticket was, after a drawing held by said Original Nacional Company, and its officers, representatives and agents, declared by said Original Nacional Company and its officers, representatives and agents, to be one of the winning tickets of the said Original Nacional Company, and its officers, representatives and agents, after said drawing aforesaid, did become liable for and did promise to pay to the holder of said ticket the sum of twelve hundred and fifty (\$1250.00) dollars in gold coin of the United States of America and did then and there promise to pay to the holder of said ticket the sum of twelve hundred and fifty (\$1250.00) dollars in gold coin of the United States of America;

“That thereafter, and on the 30th day of July, 1914, the said Antonio Caridis did present said ticket to said Original Nacional Company and to its officers, representatives and agents, and did receive from said Original Nacional Company, and its officers, representatives and agents, the sum of twelve hundred and fifty (\$1250) dollars in gold coin of the United States of America therefor;

“That at all of said times the said lottery ticket was the personal property of Jim Papas and was of the value of twelve hundred and fifty (\$1250.00) dollars in gold coin of the United States of America.”

A demurrer to the information was allowed upon the ground that the facts stated did not constitute a public offense, in the particular that it affirmatively appeared that the subject matter of the alleged larceny had no legitimate

value. The action was thereupon dismissed and the people have appealed from the order allowing the demurrer.

The ruling of the court below was correct. It is essential to the commission of the crime of larceny that the property alleged to have been stolen have some value—intrinsic or relative—which, where grand larceny is charged and the property was not taken from the person of another, must exceed the sum of fifty dollars. (Pen. Code, sec. 847; *Payne v. People*, 6 Johns. (N. Y.) 103; *Culp v. State*, 1 Port. (Ala.) 33, [26 Am. Dec. 357]; Wharton's Criminal Law, p. 1333.)

Evidently the information in the present case was framed to fit the requirements of section 492 of the Penal Code, which fixes the value in cases of the larceny of written instruments by providing that "If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen." Clearly this section contemplates and controls the value to be placed only upon written instruments which create some legal right and constitute a subsisting and an enforceable evidence of a debt. (*People v. Dadmun*, 23 Cal. App. 293, [137 Pac. 1071]; *State v. Campbell*, 103 N. C. 344, [9 S. E. 410]; *McCarty v. State*, 1 Wash. 377, [22 Am. St. Rep. 152, 25 Pac. 299]; *Wilson v. State*, 1 Port. (Ala.) 118.)

The lottery ticket which was the subject matter of the larceny charged in the present case had no relative value save, as affirmatively alleged in the information, as the evidence of a debt due from an enterprise which was denounced by law and which apparently existed and was conducted by its promoters in defiance of the law. (Pen. Code, sec. 319 et seq.) It is a well-settled principle that an obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value. An instance of the application of this principle is to be found in the analogous case of *Culp v. State*, 1 Port. (Ala.) 33, [26 Am. Dec. 357], where the court held that an indictment charging the larceny of several "bills of credit of the United States Bank," which were alleged to be of the aggregate value of \$310, could not be sustained because each of the bills was for a sum less than

the bank was authorized by its charter to issue, and consequently could not, in contemplation of law, be the subject matter of a larceny.

The fact as alleged in the information, that the drawing had taken place prior to the alleged larceny of the ticket, and that the defendant ultimately collected thereon the sum of \$1,250 from the lottery company, added nothing to the validity or value of the ticket. Being a void and valueless obligation in the eye of the law from its very inception, it could not be transformed into a legitimate and valuable thing by a voluntary payment, which in itself was a contravention of the law. (*Crutchfield v. Rambo*, 38 Tex. Civ. App. 579, [86 S. W. 950].) Moreover, the sufficiency of the information must be determined by the facts as they existed at the time of the alleged taking, and not by anything that may have occurred subsequently. (*People v. Stevens*, 38 Hun (N. Y.), 62.)

Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value, which, however small, would have sufficed to make the wrongful taking of it petit larceny, and if that had been the charge preferred against the defendant, it doubtless would have stood the test of demurrer. (1 McClain on Criminal Law, sec. 543.)

The order appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

[Crim. No. 318. Third Appellate District.—December 14, 1915.]

THE PEOPLE, Respondent, v. G. B. DYE, Appellant.

CRIMINAL LAW — GRAND LARCENY — EMBEZZLEMENT — INSTRUCTION. —

Where in a prosecution for grand larceny it is contended that if any crime was committed, it was embezzlement, and not larceny, the court correctly instructed the jury as follows: "Embezzlement is when the possession of the property has been acquired lawfully and *bona fide* and afterward fraudulently appropriated. The gist of the offense of embezzlement is breach of trust imposed in the agent, employee, or bailee, by his principal, employer, or bailor, the crime may be in general terms defined to be the fraudulent conversion of another's personal property by one to whom it has

been intrusted. When a bailee of property obtains possession of it from the owner with the intention of stealing it, and carries out that intent, he is guilty of larceny; but where the intent to steal did not exist at the time of taking possession of the property by the bailee, but was conceived afterward, it is embezzlement."

ID.—SUFFICIENCY OF EVIDENCE.—In this prosecution for grand larceny it is held that the verdict is sustained by the evidence.

ID.—EVIDENCE—STATEMENT OF DEFENDANT—DENIAL OF GUILT—FOUNDATION.—It is not necessary to show, as preliminary to the admission in evidence of a statement made by the defendant in the district attorney's office, that such statement was voluntarily made, where the statement was in no sense a confession of guilt but was in fact an assertion of innocence.

ID.—ARGUMENT OF DISTRICT ATTORNEY—PUNISHMENT—HARMLESS ERROR.—It is error for the district attorney in his argument to the jury to call their attention to the fact that the punishment for embezzlement is exactly the same as the punishment for grand larceny, but such misconduct is not prejudicially erroneous where the jury is admonished to disregard the statement.

'APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. Malcolm C. Glenn, Judge.

The facts are stated in the opinion of the court.

Ralph W. Smith, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was jointly with one L. S. Purdy charged with the crime of grand larceny, and upon his trial was convicted and by the judgment of the court sentenced to six years' imprisonment in the state prison at Folsom. Defendant appealed from the judgment and from the order denying his motion for a new trial. The charge was that defendant, on the — day of January, 1915, did "willfully, unlawfully and feloniously steal, take and carry away certain personal property, to wit: One one-hundred dollar bill of currency, one twenty-dollar bill of currency and three ten-dollar bills of currency, . . . being then and there of the personal property of one S. V. Halstead and not the property of said defendant, contrary," etc.

It is earnestly contended that if any crime was committed it was embezzlement and not larceny; that defendant's motion that the court instruct the jury at the close of plaintiff's evidence to acquit defendant should have been granted because of a fatal variance between the evidence and the charge in the information. To pass upon the merit of this contention requires an examination of what occurred after Halstead went to defendant's place of business.

It appeared from the testimony of the prosecuting witness, Halstead, that he came to Sacramento from San Francisco on Sunday, January 3, 1915, and stopped at the Western Hotel on his way to Nevada City, where he resided and pursued the profession of mining engineer; he "was suffering from a severe cold and a congestion of the breast"; Monday morning, January 4th, he met a stranger at the hotel, of whom he inquired whether "he knew if there was a system of Turkish baths—a good system of Turkish baths in the city. He said yes. He says, 'I know of something that is better than the ordinary Turkish bath.' He then spoke of the Hygienic Institute at 327½ K Street or 527½. And he said, 'I have a pamphlet in my pocket describing it,' and he handed it to me and I was impressed with it, and I says, 'I believe I will go there now.' He says, 'It is very near here, on the same street,' and I immediately went over; I went to this place, called at the office and Dr. Dye was in." This was in the forenoon. Halstead described his condition and was examined by defendant; "he took some instruments and sounded me, and he says, 'Your chest is badly congested.' " Halstead told him he was anxious to get to his home in Nevada City and wanted to know if he could get away that night but was told by defendant, "I wouldn't dare let you out before to-morrow night; I can get you away to-morrow night." Halstead asked what it would cost him, and was told that the fee would be \$10, and if he would put it up he would give him the treatment at once. Halstead testified: "I had in my inside vest pocket \$140 in bills. I had a five dollar gold piece in my left outside vest pocket, and I had some five or six dollars in silver in my pants' pocket. One bill was a hundred dollar bill, United States currency bill, and two twenty dollar bills. I pulled out one twenty dollar bill and handed it to him. He says: 'I will have to go down and get this changed. I will be right up.' A few minutes after he had gone, Mr.

Purdy came into the room and he says, 'You are Mr. Halstead?' I says, 'Yes.' 'Well, Mr. Halstead, we are going to give you a treatment in the bake oven.' Dr. Dye had spoken about what the process was before. He says, 'Just come in this room and undress,' and I did so, and while undressing, Dr. Dye came in. I took off everything, and either Dr. Dye or Dr. Purdy took my clothes and hung them up— Mr. Jones: Hung them up where? A. On a peg or a nail or a hook in the room where I undressed. Q. They were both present at that time? A. They were both present at that time; yes, sir. Q. Now, to go back a minute. When you took out your money and gave the twenty dollar bill to Dr. Dye, from where did you take that twenty dollar bill? A. From my inside vest pocket. Q. Did you take any other money out—any other bills—at that time? A. No. Q. Do you know of your own knowledge whether he saw the other bills in your pocket at that time? A. Not up to the time that I had taken off my clothes. I don't remember whether he looked into my clothes to see what was in there. I told him what I had—that I had— Q. (Interrupting.) You told Dr. Dye? A. Yes. Q. What did you tell him you had? A. I told him that I had \$150—that was including the twenty dollars that he had taken down to get changed—and he says, 'That will be all right'; he says, 'It is here in your clothes'; he says, 'Everything will be all right, Mr. Halstead.' Q. Go ahead. A. After I took the bath, or while lying in this bath, he brought some kind of liquid—I don't know what it was—that I took through a glass tube. . . . I took it through a glass tube while lying on my back. And after I got out of the bath,—I was feeling very weak,—he assisted me into a back room of his office and put me to bed. He went out of the room, after covering me up, and came in with some liquid in a glass, and I am not sure whether it was a tablet or a capsule that he had, and he said, 'Take this.' I asked him—I remember asking him—if that was an opiate. He said, 'No.' He says, 'It is a purgative.' He says, 'I want to bring you around just as quickly as I can.' Very soon after that I went off into a sleep or a stupor. I don't remember just when I awakened; when I did, I was suffering great pain. And he brought in something else in a glass and told me to take that. Q. When you gave him the twenty dollar bill, did he give you any change? A. No. Q. What did he say about

changing it, if anything? A. He never referred to having changed it at all. Q. Well, did he leave the room to go out to change it—anything of that kind. A. Yes. When I gave him the twenty dollar bill, he went out of the room immediately. He said, 'I will go and get it changed and be right back.' Q. When he came back, was anything said about the change? A. No. Q. When you took your clothes off, they were hung up there in the closet? A. Yes, sir—not in a closet; in the room in which I undressed. Q. Did you authorize him, Purdy, or anybody else, to take the money out of your clothes and take care of it, or anything of that kind? A. No, sir. Q. Did you authorize anybody—Purdy or Dye, to take charge of your money in any way? A. Not at all. Q. You just took your clothes off with the money in and left it there? A. Yes, sir. Q. Now, what else occurred that night? A. Well, I don't remember how often he came into the room, or how often he gave me something from a glass. Once or twice I know, having rapped or called, he came in and I asked him for water—some water; I was very thirsty; and I think once he brought me in some water, and I know that the second or third time he gave me some sort of medicine from a glass. Once it was a dark color, and another time it was apparently of a clear color. Q. Did he give you any liquor? A. I don't remember whether he gave me any liquor that night or not. I think it was the next day that I was suffering, and I asked him what that was, whether it was brandy or whisky, and he says, 'It is a stimulant.' I believe, as I remember, that he said that it was brandy and peppermint. Whether there was anything else in it or not, I don't know. He said, 'I want you to take what I give you.' He says, 'I want to bring you around as quickly as I can.' Q. Well, how were you the next day? A. Well, the next night I was feeling worse than I did the night before. Q. How long were you kept there? A. From Monday morning until Friday, the following Friday night, before I got out. . . . Q. Now, when you were put to bed, what clothes did you have? A. My undershirt. Q. Were you given your clothes afterward? A. Not until the following Wednesday or Thursday. I had asked often if he wouldn't bring my clothes in. Mr. Smith: Your Honor, do I understand that you ruled that all this testimony is admissible to prove larceny? The Court: I just ruled on one question that you objected to.

Mr. Smith: I object to this character of examination. It is not any proof of larceny in any way; it is irrelevant, immaterial, and incompetent so far as the issue in this case is concerned. I ask that it be stricken out and that the prosecution be instructed not to proceed further along this line. The Court: The objection is overruled. Mr. Jones: The acts that I expect to prove will show larceny. The Court: I have overruled the objection. Mr. Jones: Go ahead, Mr. Halstead. State what you said to Dr. Dye about your clothes. A. I asked him to bring my clothes in; that I had occasion to get up out of the bed and that every time I would do so, I took a chill. I asked him the first night if he wouldn't bring my clothes into the room. I don't remember whether he said he would or not, but he did not do so; and almost every time he would come in, I would ask him to bring in my clothes. I think it was either a Wednesday or a Thursday that he just brought my pants in; no other clothes. I asked him then for the rest of my clothes, and he said that I couldn't dress anyway, and he didn't want me to go out in the condition that I was in; that I must not leave my room. It was on a Friday—rather, it was on a Thursday that I began to get suspicious that something was wrong, because he had refused to bring my clothes in to me, and I told him on a Friday, I says, 'Doctor, I want you to bring my clothes in. I am going to dress; there is no use of my staying here; I will die in here. I am going to get out of here.' And he said something like this: 'Now, don't get excited; don't get excited,' he says, 'I am going to look after you; you are all right.' I had previously asked him if my money was all right. He says, 'Yes, your money and your clothes—everything is all right. Don't feel alarmed about anything.' 'Well,' I says, 'I want you to bring my clothes in to me.' He says, 'I will,' and he went out—he went out and came back in a few minutes, and he says, 'Purdy has gone out and has the key of the room in which your clothes are located. I will have to wait until he returns. As soon as he gets back, I will bring your clothes in to you.' He went out, and probably a half an hour or longer had elapsed when I got up. I was feeling very bad and desperate. I put on my pants and I went out into the hall and went toward his office door. I took hold of the knob of the door—I believe I rapped first; then I took hold of the knob of the door and it opened. It was perhaps after 7

o'clock, because the lights, I know, in the streets were burning and the light was shining in my room, and the second door from his office was open. That is where I had undressed, and I went in there and I found my clothes hanging up, and my shoes and stockings were down on the floor. Q. The same room where you went to undress? A. In the same room, and the clothes were apparently just where he had hung them when I undressed. I put on my clothes—dressed—and was sitting in his office chair when he came in shortly afterward. Q. Wait a minute. You put on your clothes and your vest. State as to whether or no you examined them to see whether your money was there. A. I did. Q. Was your money there? A. No. Q. Was any of it there? A. Nothing at all. Q. The last time you saw the currency that you spoke about, where was it? A. In my inside vest pocket. Q. Inside vest pocket; and the gold was where? A. The gold was in my outside vest pocket. Q. And where was your coin—silver? A. In my pants' pocket. Q. Now, you looked through all those pockets, did you? A. Yes, sir. Q. And none of it was there? A. None of it was there. Q. You dressed and you went in your room? A. No; I don't remember whether I went into my room. I sat in his chair in the office. While sitting there he came in and seemed very much surprised to see me there. Q. What was said? A. 'Well,' he says, 'here you are.' I says, 'Yes, and I have found my clothes; they were not locked up. They were right where they were left when I was taken out of the room.' I says, 'Doctor, where is my money?' and he never answered. I asked him two or three times; he stood there. I says, 'Where is my money?' 'Now,' he says, 'never mind anything about that'; he says, 'Don't get excited.' He had often used that expression, 'Don't get excited.' He says, 'Now that you have got your clothes on, perhaps it is better for you to come out and get some fresh air.' 'Well,' I says, 'I want my money.' 'Well,' he says, 'you will have your money.' He says, 'Don't feel alarmed; you will have your money. Come outside and get some fresh air, and perhaps you will be able to eat something.' I went out with him and we crossed over to the Thomas Cafe, and sat down, and he says, 'Now, order anything that you want.' . . . Q. Well, where did you sleep that night? A. Back in his place; not in the room that we slept in the night before or at the time that I went there. Q. When you came out of the

Thomas Cafe—you said you had nothing in there but a glass of beer? A. That was all. Q. Now, when you came out of there, did he give you any money? A. Yes, sir. Q. How much? A. I think it was three dollars. Q. He gave you three dollars? A. Yes. Q. How came he to give you that? A. I asked him for the money and he says, 'I haven't much money with me now.' He says, 'I will get your money.' 'Well,' I says, 'I haven't any money at all; I have got nothing,' and he pulled out some money in his hand and handed me three dollars and he says, 'That will do you now,' and he says, 'I will have all your money back to you.' Q. Well, you slept in his room that night, did you? A. Yes—not in the same room that I had been sleeping in. . . . Q. What conversation, if any, did you have with him the next day in regard to your money? A. It was during the next day that he admitted that he had taken my money. Q. Well, don't say 'he admitted.' Tell just what the language was and how he came to say it, and the conversation that was had between you. A. Well, those were the words that he used. He says, 'I must admit that I have taken your money.' Those were the words he used. Q. What did he say he had done with it? A. He didn't say what he had done with it. Q. What explanation did he give, if any, for not giving it to you? A. Well, I don't remember that he gave any reason for it at all. He said that he would get it and return it to me."

It appeared that Halstead remained there until the following Monday, when both defendant and Purdy were arrested and Halstead left the place; that defendant admitted that he had taken his money and used it; that, a week or two later and while he was under arrest, defendant paid back one hundred dollars to Halstead. On cross-examination Halstead testified that after giving defendant a twenty dollar bill the latter said he would get it changed and left Halstead for that avowed purpose, and while defendant was away Purdy took him into a room adjoining the "bake oven" and told him to disrobe, and that while doing so, or as he was about to do so, defendant returned and both defendant and Purday assisted him in disrobing. "Q. While you were disrobing you said you had valuables in your clothes? A. Either when I was disrobing or after I had disrobed and he had taken that, I told him and he said that would be all right, 'everything will be secure and safe.' Q. Was it not while you were taking

off your clothes and handed your vest to Dr. Dye? A. I don't remember at just what time during my undressing that I said that, or if it was after I had undressed. It was before I went into the bath. . . I was impressed that the place was reputable and genuine and Dr. Dye impressed me very much, and I hadn't the least doubt in the world but that everything was all right and safe and no question occurred to me at all. Q. The question of a breach of trust had never occurred to you? A. No. Q. You went there and, you might say, trusted your life and what you had to Dr. Dye? A. Yes, sir. Q. And you trusted what you had to him? A. Yes. Q. You did not see him put your clothes in a locker of any kind, did you, or trunk or anything? A. No. Q. They were just hung on a nail? A. Hung on a nail or hook, yes. I think in the corner between the doors of the two rooms. Q. Your vest with the valuables was hung with the other clothes? A. I believe they were at the time all hung together." He testified that he expected to be in the room there until the next day and that no room was designated for him to occupy after leaving the bath. "Q. After you had taken your bath, you did not expect to return to this room? A. Well, I hadn't thought anything about it at all where I would be placed." He testified that defendant did not give him the change but kept the twenty dollar bill. "Q. Did you not say you had trusted everything to his hands? A. I may have. I naturally would do so, because I think I remember his asking me if I had any doubts about anything being not right. I told him I had no reason for any doubt at all. Q. You trusted everything to him? A. I had confidence in the place and in him, or I would not submit to the treatment or trust him with what I had. Q. And you did trust your clothing and your money and your person to Dr. Dye? A. Yes." He testified that, "with the exception of his pants," he did not see his clothes from Monday until Friday. "Q. You turned your clothing and your money over to the care and custody of the defendant? A. Why, certainly. Q. And trusted implicitly in him? A. That my money would be there when I would come out, of course. Q. You gave him possession of your money and your clothing? A. I gave him possession of my clothing with money in it, and told him that my money was in my clothing, and he said it would be all right; it would be there when I came out.

Q. And you expected him to look after your money and your clothing, did you not, Mr. Halstead? A. Why, certainly. Q. And keep it safely for you? A. Why, I expected just the same as any clothes. I couldn't think of anything else."

On re-examination in chief he testified: "Q. Now, you took your vest off and you simply handed your vest to one of these gentlemen to hang up, or hung it up yourself? A. I didn't hang it up myself. Q. You handed it to one of them? A. Yes, sir. Q. You left it there as you would if you had taken off your clothes and was going to take a bath? A. Yes, sir. Q. There was nothing said at that time about them taking care of your money as distinct from your clothes? A. No, no. Q. You simply left your clothes there as you would anywhere when you disrobed? A. Yes, sir. Q. You are sure you did not take out the money and hand it to him and put it specially in his charge or anything of that kind? A. No, I did not. Q. You went and took your bath? A. Yes, sir. Q. You frequently asked him for your clothes? A. Yes. Q. And he put you off? A. Yes."

The district attorney dismissed the information as to Purdy and called him as a witness. He testified that he assisted Dye in disrobing Halstead and in giving him the bath. He testified that he hung up part of Halstead's clothes and Dye "hung the rest of them," and that he, Purdy, put the patient in the bake oven. "Q. Was anything said at the time in regard to any money? A. Not to my knowledge"; that the first he heard of any money was the following Friday, when he met Dye in the office. "I asked him if he had this man's money and if he had it, he better pay it back, that he would only get us in trouble. . . . Q. What did he say? A. He said that he had that all fixed up. He said everything was all right." He further testified that he saw Dye have a hundred dollar bill on Tuesday and asked him where he got it and that Dye pointed in the direction of the treatment room.

Gertrude Walker, who kept the rooming-house where defendant had his institute, testified that defendant showed her a hundred dollar bill on Tuesday or Wednesday following the day Halstead came to the place. It is not necessary to state the evidence further as to defendant's having Halstead's money. He admitted it to attorney Crowley, who was Halstead's attorney, but claimed that Halstead loaned it to him,

which the latter testified was untrue. The question urged is that the evidence failed to establish larceny.

The court correctly instructed the jury as follows: "Embezzlement is when the possession of the property has been acquired lawfully and *bona fide* and afterward fraudulently appropriated. The gist of the offense of embezzlement is the breach of trust reposed in the agent, employee, or bailee, by his principal, employer or bailor, the crime may be in general terms defined to be the fraudulent conversion of another's personal property by one to whom it has been intrusted. When a bailee of property obtains possession of it from the owner with the intention of stealing it, and carries out that intent, he is guilty of larceny; but where the intent to steal did not exist at the time of taking possession of the property by the bailee, but was conceived afterward, it is embezzlement."

"In the case of grand larceny, the taking must be with a felonious intent, as heretofore stated, but in embezzlement, the original taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted."

We are of the opinion that at the time Halstead disrobed for his bath and his clothing was "hung up on pegs or hooks" in the dressing-room adjoining the so-called bake oven the possession was not taken by defendant, nor in the sense of being intrusted to him by Halstead did he become a bailee. In fact, the clothing seems not to have been removed except that the trousers were late in the week brought to Halstead, and he found his coat and vest where they had been placed when he entered the room to take his bath. Defendant was told at the time Halstead was undressing that his money was in his clothing, and defendant's subsequent conduct justified the jury in inferring that he formed the intent to take that money and appropriate it to his own use—in short, to steal it—when he was helping to undress Halstead. But if this intent was formed the next day (and there was evidence that he had the money on Tuesday), the felonious taking would constitute larceny, for the reason that Halstead's property had not been placed in his custody and keeping. Halstead testified that he did not authorize Purdy or Dye to take charge of his money; that "he just took off his clothes with the money in and left it there." He was not told how long he would

have to remain in the bath or when he was to be taken from there. (*People v. Montarial*, 120 Cal. 691, [53 Pac. 355].) He testified that he had no reason to distrust defendant and that he trusted everything to him. Naturally he so felt or, as he testified, he "would not have been there." We do not think that these expressions of confidence in defendant must necessarily be construed as having clothed defendant with the authority of a bailee, in the sense that he could not be held guilty of larceny for having feloniously taken and appropriated his patient's money.

It is urged that the court erred in admitting the statement of the defendant taken in the district attorney's office by the chief deputy, Mr. Jones, and his stenographer. On January 11th, one week after Halstead went to these baths, defendant was arrested and taken first to his own office and then to the office of the chief of police, and thence to the district attorney's office. When arrested he was told that "it is relative to a fellow from Nevada. Probably you know about it." This occurred on the street where he was arrested. Nothing further was said until he was taken to his office. "When he got up to the office he stated, 'I haven't any of this man's money. What are they trying to rib up on me now? Some more ribbing?' He says, 'All I had of this man's money was twenty dollars.' He says, 'I don't know anything about his money.' It was along those lines. Q. He said that voluntarily before you had said anything to him? A. Yes, sir. Q. You did not tell him before that that any statement that he made would be used against him? A. He was pacing up and down in the room and he seemed to be excited and very nervous, and he was talking at random, there in the room before us. Q. Well, you did not tell him or you did not advise him of any rights, did you, before that—before making that statement? A. I hadn't asked him anything relative to it. Q. Just volunteered this statement? A. Yes." Defendant moved that this testimony be stricken out, because he was not advised of his rights. The motion was denied. Defendant was then taken to the district attorney's office, where he made a statement which was taken down by the court stenographer and was offered and admitted in evidence. Defendant objected that "he was not advised of his rights prior to the making of the statement," or "that it would be used against him on the trial, he was not properly informed." The prelimi-

nary questions were as follows: "By Mr. Jones: Dr. Dye, this is the district attorney's office. A. Yes, sir. Q. This is Mr. Carragher, the deputy district attorney. A. Yes, sir. Q. And my name is Jones; I am chief deputy district attorney. A. Yes, sir. Q. This is Mr. Warren Doan, the shorthand reporter, and you know the officer. A. Yes, sir; I have had a sad experience with the officer. Q. We brought you here to have a talk with you. A. Yes, sir. Q. I do not want you to feel that you are under any restraint or that there are any threats made against you or any promises made to you. A. Yes, sir. Q. There is a serious charge made against you, and we want to hear your statement if you have any to make. A. Well, what was the charge? Q. The charge is that you took a hundred and fifty dollars or thereabouts from a man by the name of Halstead." Then follows the statement. Defendant stated the history of Halstead's coming to his place of business, his experiences while there, and his departure from the place. It is not necessary to set out this statement. In the main it disputes Halstead's story; is a justification for what was done in treating him; denies that Halstead had the money he claims he had, and states that all the money he, defendant, got was the twenty dollar bill and a one dollar bill. The statement was in no sense a confession of guilt but was in fact an assertion of innocence.

Section 1324, Penal Code, has no application. (*People v. Panagoit*, 25 Cal. App. 158, [143 Pac. 70].) So far as the record shows, defendant made no objection to giving his connection with the transaction. There was, in our opinion, no violation of his constitutional rights in reading the statement to the jury. In *People v. O'Bryan*, 165 Cal. 55, [130 Pac. 1042], relied upon by defendant, O'Bryan was arrested on suspicion and was held in custody in the county jail. "He was taken before the grand jury which was investigating the offense, and sworn to testify. He was not informed of his constitutional right to decline to be a witness against himself, nor was he warned that his statements might be used against him." In that case the court said: "The constitution protects a person from being *compelled* to be a witness *against himself*. If, at the time he appears no accusation, formal or informal, has been made against him, he does not, in testifying, become a witness against himself. Or if, even though charged with crime, he voluntarily gives evidence

against himself, his rights are not infringed by the use of such evidence thereafter. These distinctions are well illustrated by a series of New York cases" (citing the cases). In the case here defendant did not testify; he made certain extrajudicial statements and, under the circumstances disclosed, we think they were voluntarily made. But if there was error in admitting the statement, we are satisfied from an examination of the entire record that the result was just and would have been reached if the error had not been committed. (Const., art. VI, sec. 4½; *People v. O'Bryan*, 165 Cal. 55, [130 Pac. 1042].)

Error is assigned because of alleged misconduct of the deputy district attorney. In addressing the jury he said: "Gentlemen of the jury, let me call your attention to one thing; the punishment for embezzlement is exactly the same as the punishment for grand larceny. Mr. Smith: We object to that statement, if your Honor please, and ask that the jury be instructed not to consider it. The Court: Yes, the jury cannot consider that. Gentlemen of the jury, you will not consider that statement of the district attorney." The district attorney overstepped the boundary of his privilege in addressing the jury, for the question of punishment was of no concern to them, and, as the principal defense was that there was a fatal variance between the proofs and the charge, the statement, unchallenged, might have had some influence to defendant's prejudice. We must assume, however, that the jury obeyed the direction of the court and did not consider the statement.

The judgment and order are affirmed.

HART, J., Concurring.—I concur in the judgment and in all that is said by the presiding justice concerning the effect of the evidence and the justification of the verdict of conviction under the proofs. But I do not think it is necessary to invoke article VI, section 4½, of the constitution, to uphold the court's ruling in admitting in evidence the extrajudicial statement of the defendant when in the office of the district attorney. The application of said section of the constitution in a case presupposes either error in the ruling as to which it is invoked or a doubt in the mind of the reviewing court as to the correctness of the ruling.

In the first place, the statement of the defendant in the district attorney's office is not a confession. On the contrary, it involved an explicit and direct denial of guilt of the crime charged or of any crime in connection with the defendant's transaction with the prosecuting witness. It was, therefore, unnecessary to show, preliminarily to the admission of the statement, that it was voluntarily made or not made under the inducement of hope or fear. (Greenleaf on Evidence, sec. 213.)

In the second place, I am clearly of the opinion that, had the defendant confessed that he committed the crime of larceny against the prosecuting witness under the circumstances characterizing the making of the statement which was allowed to go to the jury over his objection, we would be required to hold that it was voluntarily made. Before being questioned as to his connection with the alleged crime, the defendant was informed by the deputy district attorney that he was then in the presence of the officers of the law, including an officer who would probably have something to do with the presentation of the case against him at the trial. He was further sufficiently given to understand that he was not compelled to make a statement or "under any restraint or that there are any threats made against you or any promises made to you." This warning, I think, was sufficient to apprise the defendant of his right not to make a statement if he so elected, and that he would be shown no favor if he did make one. Of course, a confession, to be admissible as proof of guilt, must not have been "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exercise of any improper influence." (3 Russell on Crimes, 6th ed., 478.) But, as our supreme court declared, in the case of the *People v. Siemsen*, 153 Cal. 387, 394, [95 Pac. 863], "whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it, and a considerable measure of discretion must be allowed that court in determining it." (See, also, *People v. Miller*, 135 Cal. 69, [67 Pac. 12]; *Hopt v. Utah*, 110 U. S. 574, [28 L. Ed. 262, 4 Sup. Ct. Rep. 202]; *People v. Burns*, 27 Cal. App. 227, [149 Pac. 605].) Obviously, there must be some showing that the confession was freely and voluntarily made and without any previous inducement or offer of leniency in punishment, or by reason of any



intimidation or threat. (*People v. Miller*, 135 Cal. 69, [67 Pac. 12].) And that there was such a showing in this case, I am, as before suggested, thoroughly persuaded.

As I understand the object of section 4½ of article VI of the constitution, it is to be applied only where manifest error has been committed, and a review of the whole record, including the evidence, does not justify the conclusion that a miscarriage of justice will be the inevitable result of such error, if the judgment should be affirmed.

Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 10, 1916.

[Civ. No. 1584. First Appellate District.—December 15, 1915.]

WILEY B. ALLEN COMPANY (a Corporation), Respondent, v. R. L. EDWARDS, Appellant.

GIFT—PURCHASE OF PIANO FOR CHILD.—Where a stepdaughter, living with her mother and stepfather in every respect as a daughter, entered into a written contract for the purchase of a piano and gave in part payment of the purchase price an old piano, bought by the mother many years before, but paid for by the stepfather, which latter piano was purchased to be used by the daughter, and the balance of the purchase price of the new piano, which was payable in installments, was paid either by the daughter, her mother, or the stepfather, from moneys earned by the latter, the piano being purchased for the exclusive use of the daughter and being constantly referred to by the members of the family as her piano, and being delivered to her personally at the residence of her mother and stepfather, all that was done with reference to the purchase of the first piano and its exchange and the purchase of the second one being with the knowledge and consent of the stepfather, under the circumstances the stepfather intended to make a gift of the new piano to the stepdaughter, and the delivery, although not formal, was sufficient to constitute a valid gift.

ID.—DELIVERY—WHAT CONSTITUTES.—While in the case of one's child the necessity of a delivery is not dispensed with in order to constitute a gift, the formal ceremony of a delivery is not absolutely

necessary, but it is sufficient if it appears that the donor intended an actual gift at the time, and evidenced his intention by some act which may be fairly construed into a delivery.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

John Ralph Wilson, for Appellant.

Fred J. Goble, for Respondent.

KERRIGAN, J.—This is an action in claim and delivery for the possession of a Mason & Hamlin piano or its value, conceded to be one thousand two hundred dollars. The appeal is taken by the defendant from the judgment, and is before this court upon a statement of the case.

From the evidence it appears that at a time perhaps as far back as twenty years ago the defendant married the mother of Eloise Edwards, a widow, and in the year 1894, when Eloise was about five years old, Mrs. Edwards bought in her name a Knabe piano, which was paid for by the defendant. The piano was purchased to be used by Eloise who, even at that early age, had shown considerable musical talent, and who later and at the time this case was tried was generally recognized as a talented musician. In the year 1911 Eloise and her mother entered into negotiations with the plaintiff for the purchase of a new piano, which negotiations culminated in a written contract between Eloise and the plaintiff, whereby the former agreed to purchase the piano in dispute in this action. The old piano was to be taken in part payment of the new one, the sum of \$450 being credited therefor upon the price of the latter, and the balance of the purchase price was to be paid in monthly installments. In January, 1912, Mrs. Edwards died, and the following year defendant and Eloise quarreled and became estranged. Prior to that time and since she was a little child Miss Edwards had lived with the defendant as his own daughter, being entirely dependent upon him for her support, and occupying as to him in every respect the position of daughter. All the monthly payments on account of the new piano were made either by Eloise or her mother or by the defendant, but in every in-

stance with money earned by the defendant. There is still due on account of the purchase price thereof a small amount. No default in payment, however, has been made and none is claimed. Prior to the commencement of the action Eloise assigned her interest in the piano to the plaintiff, and plaintiff's right to recover herein is based entirely upon Miss Edwards' right to the possession of the instrument as its owner. While too much stress must not be attached to the fact that this piano was purchased for the exclusive use of Miss Edwards, and was constantly referred to by the members of the family as her piano, it is of considerable significance, when correlated with the other facts in the case, that the contract for the purchase of the instrument was made in her name, and that it was delivered to her personally at the residence of her mother and stepfather. All that was done with reference to the purchase of the first piano and with reference to its exchange and the purchase of the second one, was with the knowledge and acquiescence of the defendant.

We think from the evidence in the case that it is clear that the defendant intended to make a gift of the new piano to his stepdaughter; and we think, too, that while there was never any formal delivery to her of the piano, there was nevertheless, under the circumstances of the case, a sufficient actual delivery thereof to constitute a valid and subsisting gift. (14 Am. & Eng. Ency. of Law, 1020, 1033.) The piano being bulky forbade manual delivery, and the only possession its nature admitted of, so far as defendant's stepdaughter was concerned, consisted in its exclusive use in her home under a claim of ownership. (*Ross v. Draper*, 55 Vt. 404, [45 Am. Rep. 624].) Miss Edwards was regarded in every respect by the defendant as his child; and while in the case of one's child the necessity of a delivery is not dispensed with in order to constitute a gift, the formal ceremony of a delivery is not absolutely necessary, but it is sufficient if it appears that the donor intended an actual gift at the time, and evidenced his intention by some act which may be fairly construed into a delivery. (29 Cyc. 1659; *Colby v. Portman*, 115 Mich. 95, [72 N. W. 1098]; *Bennett v. Cook*, 28 S. C. 353, [6 S. E. 28].)

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.



[Civ. No. 1433. Third Appellate District.—December 16, 1915.]

J. B. ELSEA, Appellant, v. JOSEPH FASSLER, Respondent.

CONTRACT — OPTION TO SELL REAL PROPERTY — SALE BY OWNER AFTER EXPIRATION — RECOVERY OF COMMISSIONS. — Under an option to sell real estate which expressly limits the life thereof to a period of ninety days from its date, a provision therein that in the event that the owner should sell the property to anyone to whom the property had been recommended by the brokers within ninety days after the expiration of the option, he would pay them a commission of five per cent on the gross amount for which he might so sell the property, contemplates that such commission should be payable only in the event that a sale was thus made to a party to whom the brokers had recommended the property while the option agreement was still in force; and where a sale is thus made to a party recommended by them after the expiration of the ninety day period, they are not entitled to the commission.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. **J. M. Seawell, Judge.**

The facts are stated in the opinion of the court.

Albert H. Elliot, Guy C. Calden, and Clarence E. Todd, for Appellant.

John T. Carey, for Respondent.

HART, J.—This is an action to recover the sum of three thousand one hundred dollars alleged to be due the plaintiff as for a broker's commission on the exchange of real estate.

Judgment passed in favor of the defendant and the plaintiff prosecutes this appeal therefrom and from the order denying his motion for a new trial.

The basis of this action is the following "option to sell" the property therein described:

"OPTION TO SELL.

"San Francisco, Cal., Jan. 5th, 1910.

"For and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I hereby give to Chandler & Bourn, of this city, the exclusive right to sell for

me at the net price of one hundred and eighteen and 75/100 dollars (\$118.75) the following described property, to-wit: [Describing it.]

"This option to remain in full force for a period of ninety (90) days from date hereof. I agree to grant all necessary time in which to examine the title to said property, and to give a good and sufficient deed free and clear of all encumbrance. I authorize said agents, or their assigns, to accept for me and in my name, a deposit on account of the sale of said property, and in the event of the title proving defective, I agree that they are to return the said deposit, providing that the said defects cannot be cleared within sixty days after notice thereof to me in writing. If I sell to anyone within ninety days after the expiration of this option to whom said property has been recommended by said agents or their assigns, I agree to pay them a commission of five (5) per cent of the amount of said sale.

"Said agents are hereby authorized to contract for me and in my name accordingly.

"Witness my hand this 5th day of January, 1910.

"JOS. FASSLER.

"Witness: F. E. WARE."

On the day upon which the foregoing instrument was executed Chandler & Bourn, to whom said option was given by the defendant, assigned a two-thirds interest in the said agreement to J. B. Elsea and F. E. Ware, who were copartners doing business under the firm name of "The Golden Gate Land Company."

Neither Chandler & Bourn nor Elsea and Ware succeeded in selling or procuring a purchaser of the land described in said agreement during the life thereof. It appears, however, that after the expiration of the ninety days during which the option was to retain vitality and force, Ware succeeded in interesting one Dr. Maxson in the property to which the said agreement related, with the final result that Fassler exchanged said property with said Maxson for an apartment house in the city of San Francisco.

It is not claimed that the evidence does not support the findings, but the contention of the plaintiff is that he is entitled to judgment upon the findings as made by the court. This contention is founded upon the theory that the trial court's conception of the meaning and scope of the option



agreement, as indicated by its findings and the conclusion of law therefrom, is erroneous.

The court found that the agreement as pleaded was made and entered into between Fassler, owner of the property, and Chandler & Bourn; that the latter assigned the same or an interest therein to Elsea and Ware, and that finally the entire interest in the agreement was assigned to Ware; that on the twenty-ninth day of May, 1910, a contract was entered into between Fassler and Maxson whereby they agreed to exchange the properties above mentioned, and that they did subsequently make said exchange; that the said Chandler, Bourn, Elsea, and Ware "did not recommend the property of the defendant described in said contract to the said W. H. Maxson prior to the expiration of ninety (90) days from and after the fifth day of January, 1910, but did recommend said property to said W. H. Maxson prior to May 27, 1910, and urged said property upon said W. H. Maxson and procured the said W. H. Maxson to enter into the said contract or agreement of exchange between said W. H. Maxson and said defendant, and recommended the property of said defendant to said W. H. Maxson and urged said property of defendant upon said W. H. Maxson and rendered services to said defendant in and about the procuring of the exchange of said properties."

The court further found that the value of the apartment house for which Fassler exchanged the land described in the option agreement was, at the time of said exchange, the sum of sixty-two thousand dollars over and above a certain mortgage existing on said property in the sum of forty-five thousand dollars.

As suggested, the controversy between the plaintiff and the defendant arises out of a difference of opinion as to the true meaning and scope of the option agreement.

It is the position of the plaintiff that he is entitled, under the terms of the concluding covenant of said agreement, to a commission of five per cent on the value, as found by the court, of the property for which Fassler exchanged the land referred to and described in said agreement.

On the other hand, the defendant contends: 1. That the exchange of the properties did not constitute a sale within the meaning of the concluding covenant of the agreement; 2. That said part of the agreement contemplated and meant that the

property should have been sold by Fassler to a party recommended by the plaintiff and his associates, or some of them, *during the life of the option agreement.*

The court made no special finding upon the question whether the transaction involved a *sale* of the property, but adopted the construction put upon the contract by the defendant as to the time within which the plaintiff and copartners in the agreement should have negotiated the transfer of the property to have justified them in claiming compensation for such service.

The plaintiff construes the instrument as one involving two separate and distinct contracts or agreements, viz.: The one giving to the plaintiff and his assignors the exclusive right or option to sell, within ninety days from the date of the agreement, the 465 acres of land described in the instrument for the net sum of approximately fifty-five thousand dollars, they to receive as their compensation therefor all money obtained for the land in excess of that amount; 2. The other, by the terms of which the plaintiff and those interested with him in the agreement were to receive a broker's commission of five per cent on the gross amount for which the land might be sold by them or through their negotiations within ninety days from and after the time of the expiration of the so-called option agreement. This construction is predicated mainly upon the consideration that the agreement provides for two different bases of compensation to the plaintiff and his co-obligees for effectuating a sale, and particularly upon this language of the contract: "If I sell to anyone within ninety days after the expiration of this option to whom said property *has been recommended* by said agents or their assigns, I agree to pay them a commission of five per cent of the amount of said sale."

But the construction so given the agreement is, in our opinion, contrary to its general tenor. It will be noted that the *right* conferred upon the plaintiff and his associates by the agreement to sell the property is expressly limited by the instrument to exist for the period of ninety days from the date thereof, while the construction to which the plaintiff subjects the writing would obviously have the effect of extending or prolonging its life ninety days beyond the period of time to which it was so limited. In other words, if the plaintiff's construction be correct, then certainly it *was intended* by the

parties that the agreement should possess vitality and force for the term of 180 days in the place of the period of time specifically fixed therein as the term during which it should exist. Indeed, if the plaintiff's notion of the meaning of the language of the writing be well conceived and sound, the provision expressly designating the period of time during which the agreement should remain in force would be wholly meaningless and entirely supererogatory. But no such meaning can reasonably be extracted from the language of the agreement. It must be assumed that the provision expressly fixing a time to which the existence of the right under the option is restricted was intended to express the idea which its language naturally implies, and the only reasonably permissible construction of that language is that thus the parties intended to limit the time during which the authority of the plaintiff and his associates to sell or negotiate the sale of the land should exist. This construction is only in consonance with the prudent methods which ordinarily characterize business transactions of importance to all the parties connected therewith.

It results from the views thus ventured as to the meaning and scope of the agreement that, upon the expiration of the ninety days during which the option was to exist, the said agreement became *functus officio*, so to speak, and by necessary consequence all authority of the plaintiff and his associates in the agreement to sell or negotiate the sale of the property of Fassler under the terms of the said instrument ceased to exist or was terminated. It follows, therefore, that any act or step done or taken by the plaintiff and his partner and assignors, or by any one of them, looking to a sale or transfer of said property, was wholly without authority from Fassler, so far as the agreement involved here is concerned.

What, then, was evidently intended by the language of the agreement, "If I sell to anyone within ninety days after the expiration of this option to whom said property *has been recommended* by said agents," etc., was that, if Fassler himself sold the property within the time so specified to any party to whom it had been recommended by the plaintiff and his associates *during the life of the option agreement*—that is, if the property had been so recommended *while the plaintiff and his associates still had the authority to sell or negotiate the sale of the property under the provision expressly limiting their right so to do* to the term of ninety days—then,

in that case only, he would pay the brokers a commission of five per cent on the gross amount for which he might so sell the property.

Upon undisputed evidence the court found, as seen, that the negotiations for the exchange of Fassler's property for that of Maxson was initiated by the plaintiff within ninety days *after* the expiration of the ninety days within which the plaintiff and his associates in the agreement were authorized to sell the property, and thus it is to be observed that the plaintiff performed no service in the transaction eventuating in the exchange of the properties for which the plaintiff would be entitled to be compensated by the defendant under the terms of the written agreement involved here, even if it be conceded that the transaction amounted to a sale of the property or to be of a character which, had it taken place within the ninety days within which the authority of the plaintiff and associates to sell was expressly circumscribed, would entitle them to compensation on the basis of five per cent on the ascertained value of the property received by Fassler in the exchange.

Upon the foregoing considerations, an affirmance of the judgment and the order may rest, and, therefore, and in further consideration of the fact that the court made no specific finding upon that issue, it is not necessary to consider the point, urged here by the defendant, that the terms of the agreement were in no event performed by the plaintiff and his associates, for the reason that they did not *sell* the property or procure a purchaser ready, able, and willing to *buy* the same.

No other points are raised on this appeal.

The judgment and the order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 595. First Appellate District.—December 17, 1915.]

**THE PEOPLE, Respondent, v. THEODORE FULTON
TURNER, Appellant.**

CRIMINAL LAW — ABANDONMENT OF WIFE — CONSTRUCTION OF SECTION 270a, PENAL CODE.—Under section 270a of the Penal Code a husband is not guilty of the crime of abandonment and failure to support his wife where the evidence does not show that he had the ability so to do.

Id.—EVIDENCE—CONDUCT SUBSEQUENT TO DATE OF CHARGE.—While the prosecution in such a charge is bound to prove that the offense was committed on or about the date alleged, evidence of the defendant's subsequent conduct, and the question whether or not he secured employment and was able to support his wife, is admissible to show his intent when he left her on the date charged.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order denying a new trial. J. A. Bardin, Judge.

The facts are stated in the opinion of the court.

William R. Biaggi, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN, J.—The defendant was charged by information with having violated the provisions of section 270a of the Penal Code. He was tried and convicted, and this appeal is from the judgment of conviction and from an order denying his motion for a new trial.

The section reads as follows: "Every husband having sufficient ability to provide for his wife's support, or who is able to earn the means of such wife's support, who willfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter or medical attendance, unless by her misconduct he was justified in abandoning her, is punishable, etc. . . ."

The facts briefly are as follows: On January 8, 1914, the defendant was arrested upon a charge of rape alleged to have

been committed by him upon the prosecuting witness in this case, who is now his wife, Blanche Turner. At that time she was pregnant, and notwithstanding that the defendant stoutly disclaimed responsibility for her condition, he, on the advice of attorneys whom he consulted at that time, and of the justice of the peace before whom the charge was pending, consented to marry the prosecutrix, the ceremony taking place upon the second day after his arrest, at the home of G. D. Webster, the girl's father, in Monterey, and who was familiar with all the circumstances of the case. At the time of the marriage the defendant had no money, and was compelled to borrow two dollars to pay for the marriage license, which loan he obtained from the justice of the peace before whom the case was pending and who performed the marriage ceremony. G. D. Webster, the father of the prosecutrix, was a carpenter, the owner of the home in which he resided, and it seems to have been understood in a general way that the defendant and his bride were to make their home with him, and to that end a room was assigned to them. The defendant did not remain with his wife after the marriage, and the next day, after collecting eight dollars, due him from a local concern, in which he had been employed, but which had ceased to do business before his arrest, he left Monterey and went to Oregon, looking for employment.

According to a line of authorities upon which the defendant in part relies for a reversal of the judgment, the defendant's wife having been cared for by her father (who was able to support her), she was not left by the defendant in a dependent and destitute condition within the meaning of the statute. (*People v. Selby*, 26 Cal. App. 796, [148 Pac. 807]; *People v. Demos*, 115 App. Div. 410, [100 N. Y. Supp. 968, 969]; *State v. Thornton*, 232 Mo. 298, [32 L. R. A. (N. S.) 841, 844, 134 S. W. 519]; *State v. Fuller*, 142 Iowa, 598, [121 N. W. 3]; *State v. Loving*, 184 Mo. App. 82, [168 S. W. 339]; *Goddard v. State*, 73 Neb. 739, [103 N. W. 443]; *People v. Bos*, 162 Ill. App. 454.) While it is true, say those cases, that the husband is under a moral and legal obligation to support his wife, nevertheless it is only where she is dependent upon the charity of strangers, or likely to become a public charge, that his abandonment of her becomes a crime. (21 Cyc. 1611.)

In *People v. Selby*, 26 Cal. App. 796, [148 Pac. 807], it is said in reference to wife abandonment cases: "The statute upon which the information is based was obviously intended to cover those cases where the husband has willfully abandoned his wife and left her without means or resources and in a condition of absolute want—a condition in which she is unable to procure for herself the ordinary or common necessities essential to the sustenance of life. This is indeed the natural meaning of the word 'destitute' or 'destitution,' and the sense in which it is undoubtedly used in the statute. The uncontradicted evidence clearly shows that the wife in this case was not left in a 'destitute condition' by the defendant."

Those cases also seem to hold that prosecutions for wife abandonment should be cautiously instituted, and are not intended to take the place of proceedings in civil courts in which the husband may, in accordance with the circumstances of any given case, be compelled to do his full duty. But however all this may be, this case must, in our opinion, be reversed upon another ground, viz., the absence from the record of any evidence that the defendant at any time after his marriage, had the ability to support his wife. While the evidence shows that he was strong and well and able to work, it also shows that he searched for employment, but there is no evidence that he obtained any, or was able to contribute to his wife's maintenance. Mere inability to support one's wife, if there is an honest effort to obtain work, is not sufficient to constitute abandonment and nonsupport. (21 Cyc. 1612; *State v. Broyer*, 44 Mo. App. 393; *State v. Bess*, 44 Utah, 39, [137 Pac. 829, 832].) If the defendant had an opportunity to work and refused it, his conduct in that behalf would probably be regarded, in conjunction with the fact of nonsupport, as constituting a violation of the section of the code in question. (*State v. Witham*, 70 Wis. 473, [35 N. W. 934].)

The information alleges that the defendant abandoned his wife and left her in a destitute condition on the eleventh day of January, 1914; and the failure to introduce evidence *pro* and *con* as to whether or not, during any of the time from the marriage to the filing of the information, the defendant was able to support his wife, was due to the theory, apparently entertained by both sides, that the prosecution was confined in its proof in that regard to the date alleged in the information. While under the allegations of the information the prosecu-



tion was doubtless bound to prove that the offense was committed on or about the date alleged, still we have no doubt that the defendant's subsequent conduct, and the question as to whether or not he secured employment and was able to support his wife, would throw some light on his intention when he left his wife on the eleventh day of January, and therefore those matters were proper subjects for the consideration of the jury.

The judgment and order are reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 14, 1916. In concurring in the order denying a rehearing, Lawlor, J., filed the following opinion on February 14, 1916:

LAWLOR, J.—I concur in the order upon the second ground discussed in the opinion, considered in connection with the rule of decision on appeal in cases where appellate jurisdiction is conferred upon the district courts of appeal by the constitution. (Const., art. VI, sec. 4; *People v. Davis*, 147 Cal. 346, [81 Pac. 718]; *Matter of Zany*, 164 Cal. 724, [130 Pac. 710]; *Burke v. Maze*, 10 Cal. App. 206, 211, [101 Pac. 438, 440]; *People v. Vaughn*, 25 Cal. App. 736, [147 Pac. 116, 117].) I thus qualify my concurrence because of the apprehension that from the extended reference in the opinion to the first point, and the failure to cite the many authorities which hold the contrary view, the conclusion may be drawn that by denying a rehearing this court thereby approves what is said in that regard.

[Civ. No. 1384. Second Appellate District.—December 13, 1915.]

**ELLEN HUDDLESTON TAFT et al., Respondents, v.
HARRIETT WASHINGTON, Appellant.**

PARTITION WALL—LOCATION—SUFFICIENCY OF EVIDENCE.—In this action by the owners of the south half of a city lot and of the remainder in fee of the north half against the life tenant of the latter half to compel the removal of a partition wall which the defendant at the time of the commencement of the action had commenced to construct in the building which covered the entire frontage, it is held that the evidence was sufficient to establish the fact that a portion of the partition wall was located upon the plaintiff's side of the dividing line.

ID.—REMOVAL OF WALL—COMPLETION PRIOR TO SERVICE OF RESTRAINING ORDER—POWER OF COURT.—In such an action the court has power to compel the removal of the partition wall, notwithstanding the wall was completed before the service of any restraining order.

ID.—TRESPASS—POWER OF COURT OF EQUITY—INJUNCTION.—A court of equity has power to compel cessation of a trespass irreparable in its character and of a continuing nature, and in the exercise of such power, removal of obstructions placed by the defendant upon the plaintiff's property may be enforced.

ID.—TEARING UP PIPES—INJUNCTION.—The court has also the power to enjoin the defendant from tearing up or disconnecting sewer and drain pipes, independent of any easement right which the plaintiff may have therein, as the accomplishment of such acts would constitute an injury to the inheritance.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. John M. York, Judge.

The facts are stated in the opinion of the court.

John C. Stick, for Appellant.

Willis O. Tyler, for Respondents.

CONREY, P. J.—The plaintiffs are the owners of the south half of a lot which has a frontage of sixty feet and six inches on the west side of Spring Street, in the city of Los Angeles. The defendant is the owner of the north half of the lot for the term of her natural life, with remainder over to the plain-

tiffs. The entire frontage is covered by a two-story building which was erected in the year 1885 by Biddy Mason, predecessor in title of the parties to this action. The lower story of the building is divided into three storerooms. The upper story contains a number of rooms, to which access is obtained by a stairway located on the north side of the building. Plaintiffs alleged and the court has found that at the commencement of this action the defendant had under construction a wooden partition extending from front to rear of the middle storeroom through and near the center thereof and located partly on the south side of the true center line of the lot; also that the defendant threatened to tear up and disconnect certain sewer-pipes and drain-pipes which are located upon the north half of the premises and to destroy plaintiffs' access to the upper portion of the south half of the building by closing up the stairway; all of which was without the consent and was against the will of the plaintiffs. The judgment ordered the defendant to remove the said partition wall from plaintiffs' premises, that is to say, from the south half of the lot, and enjoined the defendant from tearing down or removing said pipes and drains or interfering with said stairway or committing any waste to the inheritance of the plaintiffs. From this judgment, and from an order denying her motion for a new trial, the defendant appeals.

Appellant now insists that in sundry specified particulars the evidence is insufficient to justify the findings of fact. None of these objections can be sustained. Defendant's answer did not deny that the partition was completed after the filing of the complaint herein. She merely alleged that it was already completed before any injunction issued herein was served upon her. The evidence is sufficient to establish the fact that a portion of the partition was, as found by the court, located upon the plaintiffs' side of the dividing line. The testimony of the surveyor, LeRoy I. Weeks, shows that the distance from the exterior line of the north wall of the building to the center of the south wall thereof is coincident with the width of the lot as claimed by both parties. The record shows that before erecting her building Mrs. Mason made a party-wall agreement with the owner of the lot adjoining her lot on the south which permitted her to erect a sixteen-inch wall, of which one-half would be on said adjoining lot. The fact that she did erect the building in accord-

ance with that party-wall agreement is sufficiently shown. For the defendant did not claim that the north wall of the building varies from the true north line of the lot, nor that the total width of the lot is other than the width alleged in the complaint. Therefore, the court was authorized to find in accordance with the testimony of Weeks with respect to the true location of the line of division between the south half of the property and the north half thereof. This line being established, appellant does not contend that a portion of the partition erected by her was not placed south of the line as thus located by the court.

There is no merit in the contention that, because the partition wall was completed before the service of any restraining order, removal of the wall cannot be compelled. "Where the act sought to be enjoined is only partially completed, an injunction will lie to restrain the completion of the threatened injury. And where suit is begun before the doing of the wrongful act and during the pendency of the suit the act is done by the defendant, the court will not thereby be deprived of its jurisdiction." (High on Injunctions, 4th ed., sec. 23.) The cases cited by appellant's counsel to support his proposition that wrongs already perpetrated cannot be corrected by injunction, all refer to restraining orders or injunctions *pendente lite*, the usual purpose of which is to preserve conditions as they are until after trial and judgment. There is no doubt that a court of equity has power to compel cessation of a trespass irreparable in its character and of a continuing nature, and that, in the exercise of such power, removal of obstructions placed by the defendant upon the plaintiffs' property may be enforced. (*Western Granite etc. Co. v. Knickerbocker*, 103 Cal. 111, [37 Pac. 192]; *Kaiser v. Dalto*, 140 Cal. 167, [73 Pac. 828]; High on Injunctions, 4th ed., sec. 708.)

The injunction granted by the judgment herein with respect to the tearing up and disconnecting of drain-pipes, etc., does not necessarily depend upon any easement right which the plaintiffs may have to the use of those appurtenances. It is sufficiently justified by the fact that the threatened acts, if accomplished, would constitute an injury to the inheritance of the plaintiffs in the north half of the property. The defendant has only a life interest in that property, and is not authorized to do any act to the injury of the inheritance.



(Civ. Code, sec. 818; *Crescent City Wharf etc. Co. v. Simpson*, 77 Cal. 286, [19 Pac. 426].)

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1419. Third Appellate District.—December 18, 1915.]

LELAND CONGDON, a Minor, by H. W. Congdon, His Guardian, Respondent, v. CALIFORNIA DRUG & CHEMICAL COMPANY (a Corporation), Appellant.

NEGLIGENCE—INJURIES TO DRIVER OF DELIVERY WAGON—EXPLOSION OF AMMONIA—PROXIMATE CAUSE OF INJURY—PLEADINGS AND EVIDENCE—FAILURE TO FASTEN CORK.—In this action for personal injuries received by the driver of a delivery wagon from burns caused by the popping out of the cork from a demijohn of concentrated ammonia which he was engaged in delivering, it is held that, in view of the admissions of the answer and the testimony of the plaintiff—who alone was able to describe the accident and the circumstances surrounding it—the jury were warranted in the implied findings that the defendant was guilty of negligence in sending out the demijohn without securing the cork by seal, wire, or other means, and that the plaintiff was not guilty of contributory negligence in the way he loaded or drove his wagon, or in the matter of the handling of the demijohn after it had been placed therein.

19 — MINORITY OF PLAINTIFF — ELEMENT AFFECTING RESPONSIBILITY — INSTRUCTIONS.—In such an action the minority of the plaintiff should not be presented to the jury as an element affecting his responsibility, when the nature of his employment, his intelligence, and his experience in the kind of work he was doing is taken into consideration, but instructions to such effect are not prejudicially erroneous where the jury is also instructed that notwithstanding such minority, the plaintiff's conduct was to be judged by "the knowledge, experience, and judgment that he possessed."

APPEAL from a judgment of the Superior Court of Kings County, and from an order denying a new trial. M. L. Short, Judge.

The facts are stated in the opinion of the court.

Haas & Dunnigan, and John G. Covert, for Appellant.

Earl Rogers, and H. P. Brown, for Respondent.

CHIPMAN, P. J.—Plaintiff brings the action, by his guardian *ad litem*, to recover damages for injuries alleged to have been suffered while in the employ of defendant. He recovered judgment, from which and from the order denying a motion for a new trial defendant appeals.

It is alleged in the complaint that, in the month of February, 1912, plaintiff, who was then of the age of nineteen years, was employed by defendant in the work of driving an automobile truck and the delivery of packages from defendant's place of business to its various customers in Los Angeles County, and that, after so working for about four months, defendant shifted plaintiff's employment to driving a delivery wagon drawn by a horse; that at no time during said employment did plaintiff have any knowledge of drugs and chemicals of any kind nor did he understand the natural dangers of said employment or dangers of handling the drugs and chemicals placed in his possession for delivery. The circumstances attending the injury are stated as follows: "That on the twenty-eighth day of June, 1912, and while so engaged as aforesaid with the said defendant, the said defendant caused to be placed in said wagon aforesaid, for delivery, a gallon demijohn filled with and labeled 'concentrated ammonia,' to be by said Leland Congdon delivered to one of its customers in said city of Los Angeles; that the said Leland Congdon thereafter started on his way with said horse and wagon and said demijohn so labeled 'concentrated ammonia' to deliver the same as directed by said defendant; that in the course of the trip from the said place of business of the said defendant, then located at numbers 843 and 855 Stephenson Avenue, said city of Los Angeles, the jolting of said wagon in passing over the rough places in the street caused the said demijohn to be turned over on its side, and it was shifting about in the bottom of said wagon, when the said Leland Congdon halted said horse and alighted from the said wagon, and took hold of the said demijohn and was about to place the same in a box and place some excelsior around it to prevent it from again turning over or working about in said wagon, when the cork in said demijohn which had not been secured in any way,

or tied down, popped out of the said demijohn and the contents of said demijohn, to wit, the ammonia therein, shot out of the demijohn and into the face and eyes of the said Leland Congdon." Then follows a detailed statement of medical treatment given in an effort to preserve Leland Congdon's eyesight, despite which he suffered the total loss of his left eye and serious injury to his right eye. It is alleged that "none of the agents or representatives of said defendant ever at any time or at all in any way warned or advised the said Leland Congdon of the dangers incident to the handling of ammonia put up in the way that the same was put up in said demijohn, or the dangers of being employed in or about the drugs and chemicals, which he was required to handle and deliver as aforesaid," and that by reason of his youth and inexperience and lack of knowledge "he did not know, appreciate, or understand the difficulties and dangers of his said employment"; that in preparing said ammonia for delivery by plaintiff defendant "placed in the hole in the neck of said demijohn a common cork, and did not secure said cork by seal, wire, or other means, and by reason of the action of said ammonia in said demijohn by being jolted around in said wagon and by reason of the action of the warm weather thereon, the said ammonia did expand, and the cork in said demijohn not being secured as aforesaid popped out of said demijohn and the said ammonia flew therefrom into the face and eyes of the said Leland Congdon with the result as hereinabove alleged"; that said cork "should have been secured in said demijohn by seal, wire, or other means, so as to have prevented its being so forced out as aforesaid, and that the failure of said defendant to so secure said cork was neglect and carelessness and want of ordinary care on its part," and "said injury was wholly caused by reason of said wrongful acts, carelessness, neglect, and want of ordinary care on the part of said defendant."

The answer admits the minority of plaintiff as alleged; admits his employment as alleged, but denies the averments of plaintiff's want of knowledge of drugs and chemicals and the danger attending the handling of the same; admits that, on June 28, 1912, "defendant did cause to be placed in said delivery wagon a gallon demijohn filled with and labeled 'concentrated ammonia,' to be delivered by plaintiff to one of defendant's customers"; alleges that plaintiff "did at said time know the character of said concentrated ammonia and

did know its liability to explode and did know that the same was dangerous"; admits the facts set out in the complaint as to the jolting about of the demijohn and alleges that said "shifting was caused by the careless manner in which the said Leland Congdon placed the same in said wagon." Admits that plaintiff "was about to place the same in a box and was about to place some excelsior around it to prevent it from again turning over or working about in said wagon," and alleges that he should have so secured it at the time he placed it in the wagon, and that he was careless and negligent in not doing so; that he well knew at that time that he should have so secured the demijohn; "admits that the cork in said demijohn did come out," but on information denies that the cork was not tied down or secured in any manner; denies that the ammonia struck the face and eyes of plaintiff and denies the alleged result of the escape of ammonia; alleges that defendant "did at all times inform plaintiff of the nature and character of the work required of him to be done and of the danger by him incurred, and did in particular inform said Leland Congdon of the danger of carrying ammonia in a demijohn in a delivery wagon, and did warn and instruct said Leland Congdon at all times to see that the same was securely packed in a box with excelsior surrounding it to prevent any jarring of the same"; denies that plaintiff, by reason of inexperience or want of knowledge, did not appreciate the danger of his said employment. It is further alleged that when plaintiff "picked up said demijohn and did place the same in said delivery wagon the cork of the same had not yet been secured, and that he did know that the same should not be placed in said delivery wagon without having said cork secured. Defendant admits that by reason of the action of said ammonia in said demijohn by being jolted around in said wagon, and by reason of the action of the warm weather thereon, the said ammonia did expand and the cork in said demijohn, not being secured, did pop out of said demijohn and the said ammonia flew therefrom, but as to whether or not said ammonia flew into the face or into the eyes or into either eye of said Leland Congdon this defendant is not informed. This defendant admits that said cork should have been secured in said demijohn by seal, wire, or other means so as to prevent its being forced out; this defendant denies that the failure of this defendant to so secure said cork was

neglect or carelessness or want of ordinary care on its part. Defendant alleges that said demijohn had not at said time been prepared for transportation in the said delivery wagon, and that said Leland Congdon did take the same and did place the same in said wagon before the same was fully prepared for transportation therein by this defendant, and that he did know the same was dangerous and did know that the cork in the same had not been secured, and that he did place the same in said delivery wagon without instructions from this defendant or any of its officers and purely upon his own responsibility."

Summing up the defense, it is alleged that plaintiff's injury was caused solely by his carelessness and negligent act, first, in placing the demijohn in the wagon before it was ready for transportation; second, in failing to place it in a box surrounded with excelsior; third, in driving the wagon negligently so as to cause the demijohn to be jolted and moved about in the wagon; and, fourth, in attempting to lift the demijohn in such manner that its opening where the cork was situated was directed toward plaintiff.

We have given the pleadings somewhat at length, for it will thus be seen that the issues are thereby considerably narrowed.

The answer alleges that plaintiff "did know the character of said concentrated ammonia and did know its liability to explode and did know that the same was dangerous." If plaintiff knew these facts it must be assumed that defendant believed them to exist.

The answer admits that plaintiff took hold of said demijohn "and was about to place the same in a box and was about to place some excelsior around it to prevent it from again turning over or working about in said wagon." The answer also admitted that "by being jolted around in said wagon and by reason of the action of the warm weather thereon the said ammonia did expand and the cork, not being secured, did pop out of said demijohn and the said ammonia flew therefrom." The answer admits "that said cork should have been secured in said demijohn by seal, wire, or other means so as to prevent its being forced out."

The controverted issues of fact may be reduced to the following: Was it defendant's duty to see to it that the liquid in the demijohn, or concentrated ammonia, was secured by a cork

sealed, wired, or otherwise fastened before being placed in the wagon? Was the failure properly to secure the cork in the demijohn the proximate cause of the injury? Was plaintiff guilty of contributory negligence either by reckless driving or careless handling of the packages he was hauling or in handling the demijohn at the time of the accident? Was plaintiff sufficiently instructed as to the dangerous character of the concentrated ammonia, or was he of such mature age and experience as not to require any instruction in his employment? Was the defendant guilty of culpable negligence?

The uncontroverted evidence was that plaintiff was twenty years old in June, 1912; had received a grammar school education and business course in high school—"just took book-keeping but knew nothing of chemistry"; he entered defendant's employment as driver of a gasoline delivery truck in February, 1912, and later changed to driving a horse and wagon and continued in defendant's service until June 28, 1912, the day of the accident.

Plaintiff testified that he reported to Mr. Bryant, defendant's shipping clerk, for duty and that nothing special was said about his work; "he give me my orders to take goods to a certain place. He just give me a bill of goods to deliver. He give me some tissue with the numbers of boxes and I carried the boxes out and put them in the truck and delivered the goods. The goods were put up in the boxes by him and turned over to me. I took the boxes and put them in the truck and delivered them pursuant to what instructions were on the tissues. These tissues were the same as bills, tissue paper, and there was a bill for each box. The address was on it. . . . This manner of employment continued right along during the time that I was in the employ of the defendant. Each day I would receive these orders and these boxes and go out and deliver them. . . . Q. Now, in the course of your employment there, did any of these gentlemen ever say anything to you about any of these packages that you were delivering? A. They did not, nor did they call my attention to any particular manner in which any of them should be packed, particularly the demijohns. We did not have anything to do with the packing at all. My duties did not involve the preparation of any of these packages for delivery. Q. And what was the general custom there in setting these packages out for delivery—were they placed in a particular

place for you to receive them? A. Yes, they had a place they put all the boxes and demijohns, and we would carry them out and put them on the platform on the back of our wagon. Sometimes they would put them on the back and we would load them up on the front end when we were starting. On the twenty-eighth day of June, 1912, when I started from defendant's shipping department, I had a load of boxes in the back and I had a demijohn of ammonia under the seat. That's the only way. I had a big load. There was a cork in the demijohn. It was just pushed in the neck of the bottle. It was not secured by anything. I think I placed the demijohn in the wagon. It was set out to be delivered, and had a tag to deliver it to a certain place. That had been the custom that prevailed there ever since I had been there. I had not seen any different custom. They never placed in my charge a demijohn containing this concentrated ammonia that had a cork secured in it, or that was packed in excelsior." He was asked to explain how he "came to receive this shot of ammonia in the eye or eyes." "A. I noticed that it had shifted and when I made my first stop I had an empty box and I went to take hold of it—I had delivered a box of goods, and was returning with the empty box—was putting the empty box in the wagon, and I took hold of the demijohn to put the concentrate of ammonia in—just as I got hold of it the cork flew out and went in my face—that is all I remember. I could not see after that. I crawled in the drug-store there and the druggist helped me. I could not walk, hardly. I could not see anything. I got down on my hands and knees and crawled for a ways. I got up, I think, before I got to the door. He helped me to the wash-basin to wash it off and washed my face and eyes out." He then describes the treatment given him and the effort made to preserve his eyesight. His left eye was finally removed and a glass eye substituted. "Q. Now, then, this glass eye you have, is this a source of annoyance and trouble to you? A. Yes, I have to take it out every night and it hurts during the day sometimes, and if I go out in the evening it hurts. In riding, the pressure of the wind makes it hurt. It makes a mucous and it dries on there. It has more or less matter or accumulation there each day. I wash it two or three times a day sometimes. When I am out in the field engaged in any kind of work or riding along the road, this eye dries and causes a sticky substance and a

painful feeling; in the evening it is worse and in a cold wind. I take it out and clean it two or three times a day if I am where I can. I always do it at night. The loss of this eye interferes with the performance of my usual duties on the farm. I cannot see so good on that side, naturally. In working around anybody I have to be very careful. Q. Now, Mr. Congdon, have you ever had any education or instruction of any kind in regard to drugs or chemicals? A. No, sir. I have never had any instructions in any school in relation to such matters. Q. As I understand you, the defendant in this case never told you it was a dangerous matter to be handling these demijohns full of ammonia? A. No, sir. Q. And did the defendant or any of its officers ever tell you that you should securely fasten those corks in the ammonia bottles? A. No, sir. Q. Did they ever say anything at all about it? A. No, sir. Q. And you had had no previous experience— A. No, sir. Q. —In handling ammonia, had you? A. No, sir. Q. You had never seen a bottle of ammonia from which the cork was blown out on account of the accumulated gases inside? A. No, sir, never heard of it. Q. Never heard of it before? A. No, sir. Q. And did not know at the time there was any danger in handling this demijohn of ammonia? A. No, sir. . . . Q. Just state to the jury what effect, if any, the ammonia had on your face. A. Well, on my eyelids it made the skin come off and burn my hands and give me an awful headache. It had an effect on the right eye. I could not see out of it for a long time. Not to amount to anything. Not as well as I could. I could hold it open for a little while at a time. That eye bothered me for a little while after I had the left one removed—that is for about two months. Before the accident happened I could see out of the left eye as well as I could out of the right eye. The left eye had not been previously damaged. Q. And the only affection that you have had that has caused the loss of it has been the ammonia in your eye as far as you know? A. Yes, sir. Q. Had you any knowledge or information about this occupation you had being a dangerous one? A. No, sir."

His cross-examination developed nothing to materially affect his testimony in chief. As to the method of loading the wagon he testified: "Sometimes Mr. Bryant put them in the back and we would load them up at the front end. We would place them in the truck in the way we wanted to carry

them out. A few articles were packed in boxes with excelsior around them, glass and such things. Sometimes the bottles were in boxes and there was not any excelsior around them. Q. You mention in your complaint when you started to take out the demijohn you started to put it in a box? A. Yes, sir. Q. What occurred for you to want to pack that in a box with excelsior in it? A. Well, I did not want it shaking around in the bottom of the wagon. I had not seen other demijohns or bottles packed in boxes with excelsior around them. I did not want it to break, so I put it in there, and there happened to be some excelsior in there. The excelsior was around some articles I had already delivered." He testified that Mr. Bryant assisted him in loading the wagon on the day of the accident. "Q. Now, then, you had made one delivery from the wagon on that trip? A. Yes, to this drug-store where the injury occurred. Q. And then when you came out to the wagon—was that where you first saw the demijohn lying on its side? A. No, sir, I picked it up once before, but I did not have no box to put it in. When I got there I thought I would put it in the box. Q. When you started out and put the demijohn under the seat of the wagon did you put any box or anything against it to keep it from falling? A. No, sir; I do not know as to that. Q. What was the custom in the way of packing your articles in the wagon in that regard? A. Well, if we could fix them in that way we did. I do not think we could do it in this case. I had such a big load that day. I do not think I could get the boxes under the seat. The load was mostly boxes with open tops and articles in them. The demijohn was about a foot tall. I could slip it under the seat. The demijohn was in the corner of the wagon when I started. I could not shove a box up against it. It was too big. I had some big boxes. I had some small boxes but we loaded them in so they would come out in order. Q. Well, you could have, with a change in the method of putting in the boxes, have packed the boxes up against it? A. I do not think that I could or I would have. I don't think there was room in there. It was only about that wide (indicating) under the seat. Right in front where I had the demijohn the seat came over around. The seat was the full length of the wagon. I had boxes under half of the seat, and there was a vacant space left for the demijohn. I don't think I could have shoved those boxes up against the

demijohn because there was not room enough." He was asked further to explain what occurred when the cork blew out of the demijohn and he answered: "I just picked the demijohn up and I had not got it anywhere nears out when the cork blew out. I had the box on the ground with excelsior in it. I was intending to put the demijohn in the box. I reached over into the wagon and took the demijohn and started to pull it toward me. As I started to pull it toward me the cork came out. . . . Q. Now, you are absolutely positive that nobody told you to be careful of these articles as they were taken out? A. Yes, sir. I never had any bottle or box break while I was delivering. I dropped a bottle in the store itself. I was not cautioned at that time by anybody. I do not know anything of other drivers having bottles blow out on them or spilled in any way. I never heard Mr. Bryant mention to the drivers to be careful with these articles. I never heard Mr. Clendenen tell them or Mr. Blumenberg or anybody during the entire four months say anything about any danger." He testified that it was a very hot day but did not think the sun shone on the demijohn. "Q. Now, just before your eye was taken out had there been any change in the situation? Was it aggravating or hurting you more? A. Well, they thought it was getting better, then the day before or two or three days before they took the eye out, my eye began to get weak again. That is, the right eye. They said they would have to remove the left eye to save the right eye. Then I was put under ether or something and the eye was removed and I remained there another week for treatment."

We do not deem it necessary to give the testimony of the different physicians who treated plaintiff. There was abundant evidence to show that he was given proper medical attention and that the injury complained of was the direct result of the accident, and in no wise was attributable to improper treatment.

Some testimony was submitted by defendant tending to show that concentrated ammonia is not explosive; that when the cork is removed from the container fumes pass out but no liquid; that it is not caustic and will not burn the cuticle when in contact with it; that general instructions were given to drivers of delivery wagons to use care in handling chemicals,



but no witness was able to say that plaintiff had been personally instructed. Whatever the character of ammonia may be as to explosiveness or as to whether it burns the skin when in contact with it, the undisputed fact is that in the present instance it burned the skin around plaintiff's eyes, and so burned his left eye that he lost the use of it and that he was at the trial still suffering from the necessity of using a glass eye. We think, in view of the admissions of the answer and the testimony of plaintiff—and he alone was able to describe the accident and the circumstances surrounding it—the jury were warranted in the implied findings; that defendant was guilty of negligence in sending out the demijohn of concentrated ammonia without securely fastening the cork; that plaintiff was not guilty of contributory negligence in the way he loaded his wagon or in driving it or in handling the demijohn when he took hold of it to place it in a box.

It is urged that the law would impute to plaintiff the knowledge that "almost any drug or chemical is injurious when brought in direct contact with the eyeball," and that, "as matter of law the defendant had a right to assume that plaintiff was possessed of common knowledge, and as a matter of law the defendant was not obliged to instruct the plaintiff as to any matter of which he had knowledge or presumed knowledge." It may be that plaintiff knew ammonia brought in contact with the eyeball would injure it, and that he needed no instruction on that fact, still there remained to be considered by the jury the question whether in sending out the demijohn of ammonia without properly securing the cork defendant was not negligent and whether or not such negligence contributed to the injury.

In this connection it is claimed that the court erred in giving instructions to the jury which held the plaintiff "to a different degree of care for his own preservation than he would have been if he were a year older, whereas there is nothing in the proof or the circumstances which would justify the inference that the plaintiff was under any disability by reason of his age." One of the instructions was as follows: "You are further instructed that the conduct of a minor and the question as to whether he acted negligently or not must in the nature of the case be a question of fact for the jury, rather than of law, as it is the province of the jury to determine whether or not the minor duly exercised such judgment

as he possessed, taking into consideration his years, experience and ability. The ordinary care which a minor of limited judgment and experience is called upon to exercise in a given act is not the same *quantum* of care which an adult would be called upon to use under the same circumstances."

Other instructions followed in which this difference of responsibility is pointed out, the court saying: "His [plaintiff's] conduct is to be judged in accordance with the knowledge, experience, and judgment he may possess when called upon to act. And it is a question for you, gentlemen of the jury, to say whether in the performance of his task Leland Congdon duly exercised such judgment as he should possess, taking into consideration his years, his experience, and his ability in connection with his employment, and the risks and dangers thereof." Defendant cites *Lemasters v. Southern Pacific Co.*, 131 Cal. 105, [63 Pac. 128].

When we consider the nature of plaintiff's employment, his intelligence, and his experience in the kind of work he was doing, we do not think the fact of his minority (he was twenty years old) should have been presented to the jury as an element affecting his responsibility. Coupled, however, with the qualification that he "exercised such judgment as he possessed, taking into consideration his years, experience, and ability," and further stating that "his conduct is to be judged in accordance with the knowledge, experience, and judgment he may possess when called upon to act, . . . taking into consideration his years, his experience, and his ability in connection with his employment, and the risks and dangers thereof" —we feel assured that the jury were not influenced in any material degree by being reminded by the court of the fact that plaintiff was a minor, for, notwithstanding that fact, the jury were told that his conduct was to be judged by "the knowledge, experience, and judgment he possessed."

The judgment and order are affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 14, 1916.

[Civ. No. 1897. Third Appellate District.—December 21, 1915.]

THE CITY OF SACRAMENTO (a Municipal Corporation),
Appellant, v. **GEORGE SWANSTON**, Respondent.

EMINENT DOMAIN—ATTORNEYS' FEES AS COSTS—CONSTITUTIONAL PROVISION.—The portion of section 1255a of the Code of Civil Procedure which authorizes the court upon the abandonment by the plaintiff of a proceeding in eminent domain to include in the costs assessed against the plaintiff the fee of the defendant's attorney in the proceeding, is not violative of the fourteenth amendment of the federal constitution, nor of the provisions of the state constitution requiring that laws of a general nature shall be uniform in their operation and prohibiting the passage of special laws.

ID.—CHARACTER OF PROCEEDING.—The proceeding to condemn property under the right of eminent domain is so differentiated from the ordinary actions or proceedings in courts of justice as to bring it within the settled test justifying the assignment of the proceeding to a particular class, for the purpose of reasonable provisions not applicable to other classes of actions.

ID.—EXERCISE OF POWER OF EMINENT DOMAIN—AGENCIES OF STATE—CONDITIONS.—The persons, artificial or otherwise, upon whom the right to exercise or invoke on specified occasions the power of eminent domain is conferred by the state or the legislature, are mere *agents of the state* for that particular purpose, and the legislature, in conferring such right, has the authority to impose any reasonable conditions upon its exercise by them that it sees fit.

ID.—SPECIAL LAWS—POWER OF LEGISLATURE.—It is competent for the legislature to pass laws which are designed to apply to or operate upon a certain class of persons only, but the class to which the law is solely to apply must be founded upon some natural, intrinsic, or constitutional distinction; and there must be no arbitrary discrimination between parties standing in the same relation to the subject of such laws.

APPEAL from a judgment of the Superior Court of Yolo County dismissing action. N. A. Hawkins, Judge.

The facts are stated in the opinion of the court.

Archibald Yell, for Appellant.

Arthur C. Huston, and Driver & Driver, for Respondent.



HART, J.—The action is in eminent domain for the condemnation of certain lands belonging to the defendants.

The jury assessed the damages accruing to the lands described in the complaint by reason of the taking thereof for the purposes of the plaintiff, and in due time after the verdict so rendered and entered the court, upon its findings of fact and conclusions of law, entered judgment of condemnation in the amount of damages admeasured by the jury.

The plaintiff having failed, within thirty days after the final judgment of condemnation, to pay the amount at which the damages as to the defendant Swanston's lands were appraised or fixed by the jury, as required by section 1251 of the Code of Civil Procedure, the court, in accordance with the provisions of section 1255a of said code, upon motion of said defendant, entered a judgment dismissing the action and taxing costs against the plaintiff. Included in the costs so allowed to the defendant is an attorney's fee of three thousand dollars, such a fee constituting, under the terms of section 1255a, *supra*, an item of costs which, with other legal costs, may be allowed against a plaintiff in condemnation proceedings where there has been an express or implied abandonment of such proceedings by the plaintiff at any time after the filing of the complaint.

This appeal is prosecuted by the plaintiff from said judgment of dismissal.

The principal, and, indeed, the sole complaint against the judgment arises from the allowance by the court of an attorney's fee to the defendant, the plaintiff claiming that so much of section 1255a of the Code of Civil Procedure as authorizes the court, upon the abandonment of the proceedings by the plaintiff and thereupon the entry of judgment of dismissal, to include in the costs assessed against the plaintiff the fee of the defendant's attorney in the proceeding, is unconstitutional and void for these reasons: 1. That said section in the particular mentioned violates the fourteenth amendment of the federal constitution; 2. That it contravenes certain provisions of our state constitution requiring that laws of a general nature shall be uniform in their operation and prohibiting the passage of special laws.

For the support of their position as thus stated, counsel for the plaintiff rely principally upon the case of *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, [119 Am. St. Rep. 193,

11 Ann. Cas. 712, 17 L. R. A. (N. S.) 909, 88 Pac. 982], and the cases therein cited. In the case just named, the supreme court held to be violative of the fourteenth amendment of the federal constitution and of the provisions of our state constitution requiring that every law of a general nature shall have a uniform operation and prohibiting the passage of special laws, the provision of our mechanics' lien law which authorized the allowance by the trial court in actions to foreclose mechanics' and laborers' liens, "as part of the costs . . . reasonable attorney's fees . . . , to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant."

The reasoning of the court in that case is, substantially: That it is a provision which imposes a penalty upon the defendants in such an action for a failure to pay certain debts, and thus the law singles out a certain class of debtors and punishes them when, for like delinquencies, it punishes no others. They are, therefore, not treated as other debtors, or equally with other debtors. "If the litigation terminates adversely to them," so proceeds the reasoning, "they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong. They do not recover any if right; while their adversaries recover if right and pay nothing if wrong." Thus, so goes the argument, in suits to which they are parties they are discriminated against, do not stand equal before the law and are denied its equal protection, in violation of the fourteenth amendment of the federal constitution. (*Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, [41 L. Ed. 666, 17 Sup. Ct. Rep. 255].)

In support of the position that the provision of the law concerned here involves special legislation or the granting of special privileges, rights, and immunities, contrary to certain specific inhibitions of section 25 of article IV of the constitution, the court, in the Builders' Supply Co. case, cites the following cases, which are also cited here: *Davidson v. Jennings*, 27 Colo. 187, [83 Am. St. Rep. 49, 48 L. R. A. 340, 60 Pac. 354]; *Atkinson v. Woodmansee*, 68 Kan. 71, [64 L. R. A. 325, 74 Pac. 640]; *Perkins v. Boyd*, 16 Colo. App. 266, [65 Pac. 350]; *Hocking Val. Coal Co. v. Rosser*, 53 Ohio St. 12, [29

L. R. A. 386, 41 N. E. 263]; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, [43 N. W. 1006]; *Wilder v. Chicago Ry. Co.*, 70 Mich. 382, [38 N. W. 289]; *Openshaw v. Halpin*, 24 Utah, 426, [91 Am. St. Rep. 796, 68 Pac. 138]; *Durkee v. Janesville*, 24 Wis. 464, [9 Am. Rep. 500]. In all these cases, with the exception of *Wilder v. Chicago Ry. Co.*, 70 Mich. 382, [38 N. W. 289], and *Durkee v. Janesville*, 28 Wis. 464, [9 Am. Rep. 500], in which, however, the identical principle is discussed and the same rule applied, statutes providing for laborers' or mechanics' liens are involved. As seen, the reasoning by which the conclusions in those cases are arrived at is substantially the same as that upon which the United States supreme court, in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, [41 L. Ed. 666, 17 Sup. Ct. Rep. 255], declared the Texas statute authorizing the allowance of attorneys' fees to persons having a *bona fide* claim for services, or for damages against a railroad company for stock killed, was unconstitutional and void, as in violation of the fourteenth amendment of the federal constitution.

There have been no other provisions of law, either organic or statutory, which have been the source of so wide a range of discussion or which have been more difficult to apply in given cases than those inhibitions of the state and federal constitutions whose purpose is to establish equality before the law, and, therefore, the uniform operation of all laws of a general nature and the prohibition of class and special legislation.

It is not true that any law which is designed to operate upon a particular class of persons or property involves special legislation or is wanting in uniformity of operation or denies to a person the equal protection of the law within the meaning of the constitutional guaranties relating to those subjects. Indeed, that even special laws are in certain cases permissible under our present state constitution and the cases expounding the provision which, by implication at least, authorizes such legislation, is a well-settled proposition. (Art. IV, sec. 25, subd. 33; *People v. McFadden*, 81 Cal. 498, [15 Am. St. Rep. 66, 22 Pac. 851]; *People v. Mullender*, 132 Cal. 221, [64 Pac. 299]; *Board of Directors v. Nye*, 8 Cal. App. 527, 542, 543, [97 Pac. 208].) It is true, however, that the design of the framers of our present constitution, by inserting into that instrument provisions prohibiting class or

special legislation, was to correct or prevent a repetition of the evils which grew up under the constitution which the present superseded from the vast amount of special legislation, applying only to certain persons and things, which found its way to our statute books. The result is that now special legislation is not, as formerly, generally permissible, but only allowable where the exigency of the occasion imperatively calls for a special law.

It is obvious, however, that the case now before us is not of that class where a resort to special legislation is necessary or contemplated by subdivision 33 of section 25 of article IV of the constitution. The sole question here, then, is, whether the law in question as to the particular provision thereof under review, being a law of a general nature, is wanting in uniformity in its operation, or whether it is a special law within the constitutional inhibition in that regard or offends the mandate of the national constitution against the passage of laws having the effect of denying to any person within the jurisdiction of this state the equal protection of the laws.

What is meant by the provision of our constitution that "all laws of a general nature shall have a uniform operation" (art. I, sec. 11)—a provision which was contained in the state constitution of 1849—was as clearly and logically explained as that language has ever been, judicially, in the very early case of *Smith v. Judge Twelfth District Court*, 17 Cal. 555, by the late Judge Baldwin, voicing the views and conclusion of the court. In that case, the question was as to the validity of a statute passed by the legislature not only authorizing but making it the duty of the judge of the district court of this state to transfer a criminal case for trial from the city and county of San Francisco, where the crime was committed, to the district court of the eleventh judicial district, in and for Placer County. The constitutionality of said act was upheld, it being permissible under the constitution of 1849 to pass special laws, with the result that there was had under that instrument special legislation upon an infinite variety of subjects. The court in that case said: ". . . The construction given to the word 'uniform,' in this view (the view urged by counsel), is *universal*. . . . But this is absurd, for different classes of crimes may and do call for different modes of procedure. . . . But the error is in a misapprehension of this term *uniform*. The language must be carefully noted. It is not

that all laws shall be universal or general in their application to the same subjects, nor is it even that all 'laws of a general nature' shall be *universal* or general in their application to such subjects; but the expression is that these laws 'of a general nature' shall be 'uniform in their operation'—that is, that such laws shall bear equally, in their burdens and benefits, upon persons standing in the same category. But this category depends upon facts which characterize the offense. Every defendant is not entitled to the same privileges, or subject to the same burdens, as every other; for instance, some are entitled to bail, others not, and this depends upon the particular facts characterizing the imputed crime. When we speak of uniformity in the operation of a law, we speak of that operation which is equal *under the same facts*; for what justice or uniformity would there be in applying the same rigor of remedy or the same measure of criminality, merely because there existed a similarity or identity in the general charge? The effect of laws of a general nature shall be the same to and upon all; but who are 'the all' who are the subjects of this operation? Obviously, the answer is, all who stand in the same relations to the law; all, in other words, the facts of whose cases are the same. To treat one man differently from another man—to deny to one man a privilege extended to another man—is not partiality; it may be a just discrimination; to constitute partiality and the invidious discrimination against which the constitution aims, the denial to another of what is given to one must be made upon substantially the same facts; or, to express the idea differently, the denial must be of *the same claim* before accorded."

Although, as stated, the framers of our present constitution took particular pains to guard against the indiscriminate enactment of laws the effect of which was to operate only upon particular persons or things, still, in the very nature of things, it was and is impossible, in a state, like ours, having a variety of interests calling for diverse kinds of legislation, sometimes antagonistic to each other, and where, therefore, a single rule, universal in its application throughout the commonwealth, would operate as a distinct and positive detriment to the interests of certain localities or certain classes of people, to present a system of laws alike applicable to all of the great variety of conditions in the state. Hence, the framers of

the constitution recognized the necessity of laws which, in a sense, would be special so far as their operation was concerned—special in the sense that they applied or were to apply to certain classes of persons or things only to the exclusion of all other classes. It is, therefore, competent for the legislature to pass laws of this character; that is, laws which are designed to apply to or operate upon a certain class of persons only, but the rule is that the class to which the law is solely to apply must be founded upon some natural or intrinsic or constitutional distinction, or, in other words, “the individuals to whom the legislation is applicable must constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class.” (*City of Pasadena v. Stimson*, 91 Cal. 251, [27 Pac. 604], and numerous other cases cited on page 536 in *Board of Directors v. Nye*, 8 Cal. App., [97 Pac. 208]. And, furthermore, lest by such enactments, the constitutional inhibition against special legislation may be violated, it is the rule that, in the passage of laws designed to operate upon a particular class only, there must be no arbitrary discriminations between parties standing in the same relation to the subject of such law, and that if, by such laws, such discriminations are made, then the legislation will fall under the force of the constitutional mandates against special enactments. (*Ex parte King*, 157 Cal. 161, [106 Pac. 578], and cases therein cited.) And in that case it is further said: “If it [the law] operates uniformly upon all members of such class, it necessarily has the ‘uniform operation’ required by section 11 of article I of the constitution. The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that when such legislation is attacked in the courts, every presumption is in favor of the legislative act. Where, upon the facts legitimately before a court, it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the legislature in creating the class, though such reasons may not clearly appear from a mere reading of the law, such assumption will be made, and the legislation adopted. To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative de-

partment in finding the difference and making a discrimination." (See *Grumbach v. Leland*, 154 Cal. 679, 685, [98 Pac. 1059].)

Thus we are now brought face to face with the concrete proposition submitted for decision in this case, and by the light of the principles above stated the question must be considered and determined.

Eminent domain is an attribute of sovereignty and the right or power of a sovereign state to appropriate private property to particular uses without the consent of the owner. The taking of private property by the state, in the exercise of this power, cannot be, abstractly viewing it, less justifiable on moral grounds than the enforced taking of private property by one individual from another for the latter's private uses. It is justifiable only because the power makes for the common benefit, and is upheld upon the theoretical conception that every owner of private property takes and holds such property subject to the condition that the state may take it from him, if occasion discloses that the common welfare will be the better subserved by its public use than by its private ownership. The people of the state, or that portion of the people who are vested with the right of franchise, in whom the power resides, have delegated the power to the legislature, and the latter, in turn, has constituted certain specified persons as the agents of the state for the exercise of the power in particular instances. The constitution of this state, as does that of nearly every other state, provides that, in the exercise of this power, no property shall be taken or damaged without just compensation having been made to, or paid into court for, the owner. (Art. I, sec. 14.) Notwithstanding the condition thus imposed as a prerequisite so to take one's property, the fact remains that when property is taken under the right of eminent domain, it is taken against the will or consent of the owner. And private property may thus be taken, even if the owner, for reasons peculiar to himself, would prefer to retain it rather than to receive for it a sum vastly in excess of its actual value for any practical purpose to which it might be put. In brief, when the state, through any of its duly constituted agencies, makes a call for the property for a public use, it must be surrendered in any event; and whether the "property" referred to in the constitution be merely the *rights* in the thing so desired or the *thing* itself, it is never-

theless true that the enforced giving up of the rights therein amounts in practical and substantial effect to a like giving up of the title to the *thing* itself. The result is that when this power is sought to be visited upon particular privately owned property, the owner thereof is, if proceedings in condemnation be found necessary, forced into litigation as to the subject matter of which he is in no way in default or for which he is not responsible in the sense in which a defendant who has breached a contract or by affirmative acts on his part has deprived the plaintiff of a right or imposed upon him a wrong is responsible for litigation. He, in short, although not desiring to give up his property for the price offered for it, or at all, and, although acquiring title to it subject to the burdens which follow from an inherent power or *legal* right in the people in their sovereign capacity, does not invite the litigation, nor is he the *actor* therein, as one who violates a contract or commits some private wrong invites the litigation necessary to enforce the obligations of the contract or to correct the wrong.

Thus it must at once become obvious that a proceeding for the condemnation of private property for a public use, under the power of which we have been speaking is, in its origin, its purpose and its characteristics, essentially different from any other action or proceeding established by our law as an instrumentality for the enforcement of a private right or the redress or prevention of a private wrong. It is, indeed, not included by the code within the category of ordinary actions at law or suits in equity, but is denominated, with others, as a "special proceeding," and even as to other proceedings so denominated in the code, it is, by reason of the characteristics peculiar to it, strictly *sui generis*. It, therefore, cannot be doubted that the proceeding to condemn property under the right of eminent domain is so differentiated from the ordinary actions or proceedings in a court of justice "by which one party prosecutes another for the enforcement or protection of a right, or the redress of a private wrong," as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purposes of reasonable provisions not applicable to other classes of actions. The test in that regard is: If the classification is "based upon some difference bearing a reasonable and just relation to the act in respect to

which the classification is attempted," any reasonable special provision as to the action so classified, and which is not applicable to other classes, will not be held to be void as involving special or discriminatory legislation within the constitutional provisions upon that subject. This rule is conceded in all the cases, and is elaborately considered by Chief Justice Angellotti in the case of *Engebretson v. Gay*, 158 Cal. 30, 32, [109 Pac. 880], in which, after reviewing many cases, including *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, [119 Am. St. Rep. 193, 11 Ann. Cas. 712, 17 L. R. A. (N. S.) 909, 88 Pac. 982], mainly relied upon by the appellant here, it is held that a provision in the street improvement act of 1885, allowing, in addition to the taxable costs, an attorney's fee to the plaintiff in an action to foreclose a lien upon property improved under said act, is not discriminatory or violative of the state constitutional inhibition against special legislation or of any provision of the federal constitution. The theory of the decision, as we understand it, is that, as may be done where there is default in the payment of the ordinary taxes assessed against property, the legislature has the right to impose upon those defaulting in the payment of street assessments for the improvement of streets a penalty which may include a reasonable attorney's fee.

In the case at hand there exists no basis for the reasoning which led to the conclusion arrived at in *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, [119 Am. St. Rep. 193, 11 Ann. Cas. 712, 17 L. R. A. (N. S.) 909, 88 Pac. 982], and in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, [41 L. Ed. 666, 17 Sup. Ct. Rep. 255]. In those cases it was held, as we have seen, that an allowance to the plaintiff of an attorney's fee if he was victorious in the trial was distinctly discriminatory, because no such allowance was provided for for the defendant in case he prevailed at the trial. In this case, however, as in no other case of which we can presently think, the statute gives to the plaintiff the right to abandon the proceeding, even after a trial thereof and a verdict and judgment of condemnation rendered and entered, and, as a penalty for such abandonment, accords to the defendant the right to be reimbursed by the plaintiff for not only the ordinary costs but an attorney's fee. No right of abandonment is awarded by the statute to the defendant, and, in the very nature of the case, there could not be so that it would affect or impair the right

of the plaintiff to condemn and take his property. The conditions as to the two parties in the proceeding are essentially and radically different.

But, in our judgment, the real rationale of the authority of the state, to which the sovereign power has delegated the jurisdiction over the right of eminent domain, to exact from the plaintiff the payment as costs of a reasonable attorney's fee to the defendant under the circumstances indicated in the statute and which, in our opinion, could be so exacted in any event or under any circumstances, lies in the control, hedged only by limited constitutional restraints, it has over that sovereign right.

As before explained, the persons, artificial or otherwise, upon whom the right to exercise or invoke on specified occasions the power of eminent domain is conferred by the state or the legislature are mere *agents of the state* for that particular purpose. They are, in other words, by the state specially clothed with power to exercise a right of sovereignty which they could not exercise but for the action of the legislature in clothing them with the authority of agents for that purpose. The act of conferring that power upon those persons is entirely and purely voluntary upon the part of the state. The state cannot be compelled to part with it by conferring it upon other persons desiring to exercise it, but may withhold it and itself exercise it, subject, of course, to the constitutional restraints referred to, to the exclusion of all other persons or instrumentalities. Therefore, no one will dispute the right in the legislature, in conferring the right to exercise the power of eminent domain upon others, to impose any reasonable conditions upon its exercise by those others as it sees fit. In this state it has imposed upon those in whom it has invested that right, as one of the conditions upon which they may exercise it, the requirement that, in case they abandon the proceedings in condemnation after they have instituted them, they must pay the defendant, in addition to ordinary taxable costs incurred by him by reason of the proceeding, reasonable attorneys' fees. The condition is not an unreasonable one to impose in such a case. The right of eminent domain involves an extraordinary power of sovereignty. While it is an eminently proper and necessary right of sovereignty, its exercise should be carefully guarded so as to prevent abuses arising under it. The legislature can, as

stated, and it should, impose upon its exercise such reasonable conditions as will discourage litigation not founded upon merit arising under it, or as will penalize to a reasonable extent those who resort to it with the intention of securing property at the price they appraise it for and abandoning the proceeding if the value fixed by the jury and court are in excess thereof even only in a reasonable amount. Under the statute complained of here, if the plaintiff accepts the property at the price at which it is judicially appraised, the defendant only receives the compensation so fixed. If the property is not accepted by the plaintiff, then he must reimburse the defendant for the expenses which he has been compelled to bear in litigation for which he was not responsible.

Thus it is plainly to be seen that the section of the code in question does not impinge upon any provision either of the state or federal constitution. The provision animadverted upon here applies alike to all of the class to which the section applies. It does not discriminate as between persons belonging to that class and denies to none the equal protection of the law.

The views thus expressed are in accord with those advanced upon precisely the identical question by the adjudicated cases. Some of these cases we have already referred to. But there is another case to which we may well refer in connection with the observations last above made. The case is from the supreme court of Illinois. In that state, the legislative law upon eminent domain, among other provisions, contains one like ours, allowing the defendant, in proceedings to condemn property under the right of eminent domain, his costs and attorneys' fees, to be taxed against the plaintiff, when the latter dismisses or abandons the proceeding. In *Sanitary District of Chicago v. Bernstein*, 175 Ill. 215, [51 N. E. 720], the validity of the provision of the statute of said state so allowing attorneys' fees was challenged upon constitutional grounds similar to those urged here. The Illinois court disposed of the objections in a well-considered opinion, from which we here present an extended excerpt because of its cogent application to the present case:

"The ground upon which it is argued that the provision is unconstitutional is that it is special legislation, and imposes upon one class of litigants a charge from which all others in-

stituting proceedings in court are free. Any other plaintiff or petitioner may dismiss his suit while pending and suffer no penalty beyond the payment of statutory costs; while, if a petitioner under the eminent domain act shall, for any cause, dismiss the petition, the statute gives a right to the defendant to recover, in addition to the taxable costs, the amount paid or incurred by him for costs, expenses, and reasonable attorneys' fees in his defense. Every citizen has an equal right with every other to resort to the courts of justice for the settlement and enforcement of his rights; and it is true that a discrimination between different classes of litigants, which is merely arbitrary in its nature, is a denial of that right and of the equal protection of the law. If, however, there be a reasonable ground of distinction, so that the discrimination does not appear to be purely arbitrary or evasive of constitutional rights, we think that the legislature has a discretion to impose conditions or restrictions which they may deem in furtherance of justice. That discretion cannot be controlled by the courts, but its exercise must be left to the wisdom and sense of justice of the legislature. We think that no one will fail to observe a difference, in principle and natural justice, between a litigation where plaintiff invokes the action of the court to recover money or property from another, and dismisses such action, and a proceeding to ascertain the compensation to be paid for property to be taken for public use. The constitution protects the owner by a provision that his property shall not be taken for public use without just compensation. The proceeding is not the enforcement of individual right, but to settle the condition upon which the sovereign power to take the property may be exercised. The judgment is not binding upon the petitioner, but it may decline to enter upon the property or to make payment of compensation. If the possession is taken, and the compensation paid, the owner gets nothing but the fair cash market value of his property; and if it is not paid, or the attempted taking is discontinued by the dismissal of the petition, he is a loser to the extent of the amount expended. The act seems to be in harmony with the spirit and intent of the constitution, and we think it valid." (See, also, *Gano v. Minneapolis & St. Louis R. R. Co.*, 114 Iowa, 713, 89 Am. St. Rep. 393, [55 L. R. A. 263, 87 N. W. 714], and cases therein cited.)

The city attorney, representing the plaintiff in this proceeding, has presented his side of the case here in a forceful and masterly and an earnest manner; but the authorities are clearly against his position, and, as must be manifest from the discussion herein, we are, upon the authorities as well as upon principle, constrained to the conclusion that the law under attack on this appeal is not amenable to the objections on constitutional grounds urged against it.

The judgment is, accordingly, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 333. Third Appellate District.—December 21, 1915.]

In the Matter of the Application of JEREMIAH C. O'CONNOR for a Writ of Habeas Corpus.

HABEAS CORPUS—QUESTION INVOLVED—JURISDICTION.—The sole ultimate question which is involved in a proceeding on *habeas corpus* is one merely of jurisdiction—that is, whether the order or the judgment or the adjudication or the process whose validity is thus attacked and questioned was one coming within the lawful authority or jurisdiction of the judge or the court or other legally constituted tribunal making, granting, or issuing it.

ID.—COMMITMENT OF INSANE PERSON—REGULARITY OF PROCEEDINGS—PRESUMPTION.—In a collateral attack by *habeas corpus* proceedings upon the validity of an order committing a person to a hospital for the insane, where the court has jurisdiction of the subject matter and of the petitioner, it must be assumed, in the absence of a contrary showing appearing upon the face of the judgment-roll, that the proceedings leading to the judgment or order of commitment were in all respects regular or had in accordance with the vital requirements of the statute authorizing the commitment.

ID.—COMMITMENT FOR INEBRIETY—TIME OF HEARING.—In a proceeding for the commitment to an insane hospital of a person charged with dipsomania or inebriety, it is not an abuse of discretion to set the time for the hearing and examination a few hours after the accused was brought before the judge, where it is shown that he was then informed as to all the rights guaranteed him under the statute.

ID.—PRODUCTION AND EXAMINATION OF WITNESSES—"REASONABLE OPPORTUNITY"—CONSTRUCTION OF SECTION 2185C POLITICAL CODE.—The "reasonable opportunity" to produce and examine witnesses

which the statute contemplates shall be given a person charged and examined under section 2185c of the Political Code is a matter which must be determined by the circumstances of each particular case, and thus the matter is one whose determination rests in the sound discretion of the judge before whom the charge is pending and heard.

ID.—OMISSION TO PROVIDE FOR JURY TRIAL—CONSTITUTIONALITY OF SECTION 2185c, POLITICAL CODE.—One accused of inebriety is not entitled as of right to a jury trial, and section 2185c of the Political Code is not unconstitutional because it omits to provide for such a trial in cases arising under its provisions.

ID.—TRIAL BY JURY—CONSTITUTIONAL LAW.—The right of trial by jury secured by the constitution is the right to a jury trial as it existed and was recognized at common law.

APPLICATION originally made to the District Court of Appeal for the Third Appellate District for a Writ of Habeas Corpus.

The facts are stated in the opinion of the court.

Edward D. Wilbur, for Petitioner.

Edward D. Tyrrell, and W. F. Stafford, for Respondent.

HART, J.—The petitioner was, on the ninth day of June, 1915, by the Honorable John J. Van Nostrand, a judge of the superior court in and for the city and county of San Francisco, committed, under and by virtue of the provisions of section 2185c of the Political Code (Stats. 1911, p. 396), to the Napa State Hospital for the cure and treatment of the insane.

The petitioner insists that the order of commitment under which he is held at the state hospital is void, for reasons to be hereafter noticed, and that, therefore, his confinement in said institution involves an unlawful restraint of his personal liberty.

So much of section 2185c of the Political Code as is necessary to a clear understanding of the points made by the petitioner reads: "Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety, he must issue and deliver to some peace officer for service, a warrant directing that

such person be arrested and taken before a judge of the superior court for a hearing and examination on such charge. Such officer must, thereupon, arrest and detain such person until a hearing and examination can be had. At the time of the arrest a copy of said affidavit and warrant of arrest must be personally delivered to said person. Such affidavit and warrant of arrest must be substantially in the form provided by section 2168 of the Political Code for the arrest of a person charged with insanity. He must be taken before a judge of the superior court, to whom said warrant and affidavit of arrest must be delivered to be filed with the clerk. The judge must then inform him of the charge against him, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto. The judge must by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses. Such order must be entered in the minutes of the court by the clerk and a certified copy of the same served on such person. The judge may also order that notice of the arrest of such person and the hearing of the charge be served on such relatives of said person known to be residing in the county, as the court may deem necessary or proper. The hearing and examination shall be had in compliance with the provisions of sections 2169 and 2170 of the Political Code."

Sections 2169 and 2170 of the Political Code read as follows:

"Section 2169. The superior judge may, for any hearing, issue subpoenas and compel the attendance of witnesses and must compel the attendance of at least two medical examiners, who must hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge as to the result of such examination, and to any other pertinent facts within their knowledge. The judge must also cause to be examined before him as a witness, any other person whom he has reason to believe has any knowledge of the mental condition of the alleged insane person or of his financial condition or that of the persons liable for his maintenance. The alleged insane person must be present at the hearing, and if he has no attorney, the judge may appoint an attorney to represent him.

"Section 2170. If the medical examiners, after making an examination and hearing the testimony, believe such person

to be dangerously insane, they must make a certificate, under their hand, showing as nearly as possible the facts as herein indicated, and in substantially the following form": Then follows the form of the certificate of the medical examiners appointed to investigate the condition of the patient, which must, among other things, contain a general statement of the facts from which the medical examiners have reached the conclusion that the patient "is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety."

The petitioner presents and urges several different and distinct grounds upon which he bases the claim that his commitment to the state hospital was beyond the authority of the judge to order. These are: 1. That a copy of the affidavit upon which the warrant for his arrest was issued and of said warrant of arrest were not personally delivered to him at the time of his arrest; 2. That the time fixed by the judge after the petitioner was brought before him for the hearing of the charge was not such as to afford to the petitioner "a reasonable opportunity for the production and examination of the witnesses"; 3. That the petitioner was as a matter of right entitled to a trial by jury upon the charge preferred against him, and that, such right having been denied to him, his commitment to the state hospital was not the crystallization of a trial according to due process of law; that section 2185c, by reason of the absence therefrom of a provision giving to persons charged thereunder the right of trial by jury, is unconstitutional.

Obviously, the sole ultimate question which is involved in a proceeding on *habeas corpus* is one merely of jurisdiction—that is, whether the order or the judgment or the adjudication or the process whose validity is thus attacked and questioned was one coming within the lawful authority or jurisdiction of the judge or the court or other legally constituted tribunal making, granting, or issuing it. And, since it is clear that the judge making the adjudication assailed through this proceeding is by law invested with jurisdiction of the subject matter thereof, and that he acquired jurisdiction of the person of the petitioner, it must be assumed, in this collateral attack upon the adjudication, in the absence of a contrary showing appearing upon the face of the judgment-roll, if it may so be called, that the proceedings leading to the judg-

ment or order of commitment were in all respects regular or had in accordance with the vital requirements of the statute authorizing the commitment. (*Ex parte Clary*, 149 Cal. 735, [87 Pac. 580]; *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298, [94 Pac. 597, 600]; *Ex parte Lewis*, 11 Cal. App. 530, [105 Pac. 774]; *Gridley v. College of St. Francis*, 137 N. Y. 327, [33 N. E. 331].) These observations apply particularly to the first two points, in the order above given, against the validity of the commitment.

The affidavit upon which the warrant of arrest was issued was made and filed by Jeremiah O'Connor, Jr., a son of the petitioner, on the eighth day of June, 1915, and on that day was, with a copy thereof and a copy of said affidavit, given into the hands of a police officer.

The certificate of the officer executing the warrant and which is a part of the record in the proceedings recites that said officer received said warrant on the eighth day of June, 1915, and served the same by arresting said Jeremiah O'Connor, alleged to be an inebriate, and brought him before Honorable John J. Van Nostrand, judge of the superior court of the state of California, in and for the city and county of San Francisco, *on the eighth day of June, 1915*, "and I further certify," continues the certificate, "that I delivered a copy of said warrant of arrest, together with a copy of the affidavit of intemperance, as directed in said warrant, personally to said Jeremiah O'Connor at the time of his arrest."

The order fixing the time for the hearing of the charge, as does the judgment or order of commitment, recites that the petitioner was brought before the judge on the ninth day of June, 1915, upon a warrant issued upon an affidavit sworn to by Jeremiah O'Connor, Jr., that he was then and there, in open court, informed of the charge alleged in said affidavit against him, and was further informed of his rights to make a defense to such charge, and to be represented by counsel, and produce witnesses in relation to such charge. The order fixing the time for hearing also required that a copy of the same be served on the petitioner, the time for the hearing having been fixed for the hour of 11 A. M. of said ninth day of June, 1915, and one Roseberg certified that he served said order on the petitioner by delivering to him a copy of the same.

Thus it will be observed that there is absolutely no ground for the contention that a copy of the affidavit and the warrant

was not personally delivered to the petitioner at the time of his arrest, as the statute requires shall be done.

As to the point that the petitioner was not accorded "a reasonable opportunity for the production and examination of witnesses," as the statute requires, we cannot say that the judge abused his discretion in that regard. As has been shown, the record discloses that the petitioner, upon being brought before the judge, was by the latter informed of all the rights guaranteed to a person charged under section 2185c with being an inebriate or dipsomaniac. He was explicitly told that he was entitled to subpoena witnesses and to examine them at the hearing in his own behalf.

What constitutes the "reasonable opportunity" to produce and examine witnesses which the statute contemplates shall be given a person charged and examined under section 2185c of the Political Code is a matter which must be determined by the circumstances of each particular case, and thus the matter is one whose determination rests in the sound discretion of the judge before whom the charge is pending and heard. This court so held in the case of *In re Lewis*, 11 Cal. App. 530, 532, [105 Pac. 774], where the petitioner, an insane patient, was examined under the provisions of sections 2168 et seq. of the Political Code, and wherein he raised the identical point under consideration, the section just named also providing that the patient must be given "a reasonable opportunity for the production and examination of witnesses." We there, among other things, said: "The determination of what is 'reasonable opportunity' is committed by the statute to the sound discretion of the court, to be exercised in view of the surrounding circumstances of each particular case, and where it does not appear on the face of the proceedings that such discretion has been abused, the judgment of the court, for the alleged reason that the person adjudged insane has not been given a reasonable opportunity to produce his witnesses and cause them to be examined touching his mental condition, cannot be disturbed."

The statute does not provide that any particular space of time shall intervene between the time at which the order is made fixing a time for the hearing and the time so fixed, and the mere fact that in this case there could have intervened only a few hours between the time of making the order and the time specified therein for the hearing does not necessarily

justify the conclusion that the petitioner was not accorded a "reasonable opportunity" to produce and examine his witnesses. Whether the petitioner availed himself of this right by having witnesses produced and examined, is not made affirmatively to appear in the record. Indeed, the law nowhere requires that that fact shall be so made to appear. But it is to be assumed that, had the petitioner, having been informed of his rights in that regard, made a demand for the production of witnesses and presented the names of such witnesses, the judge, in obedience to the duty expressly enjoined upon him by the statute, would have given the petitioner ample opportunity to have produced such witnesses, and, if necessary for that purpose, have continued the hearing to some future time. It does not appear in the record that any such demand or request was made by the petitioner.

Upon this point we conclude that upon no view of the record can it be said that the petitioner was denied the "reasonable opportunity" for the production and examination of witnesses to which he was entitled under the statute.

3. The contention that the petitioner was entitled as of right to a trial by jury is untenable, and it follows, therefore, that section 2185c is not unconstitutional because it omits to provide for a trial by jury in cases arising under its provisions.

The right of trial by jury secured by the constitution is the right to a jury trial as it existed and was recognized at common law. (*Koppicus v. State Capitol Commrs.*, 16 Cal. 249; *Cassidy v. Sullivan*, 64 Cal. 266, [28 Pac. 234]; *Woods v. Varnum*, 85 Cal. 639, 644, [24 Pac. 843]; *People v. Powell*, 87 Cal. 348, [11 L. R. A. 75, 25 Pac. 481]; *Ex parte Wong You Ting*, 106 Cal. 296, [39 Pac. 627]; *In re Fife*, 110 Cal. 8, [42 Pac. 299].)

The *Koppicus* case involved the question whether an act of the legislature, providing for the construction of the state capitol in Sacramento and investing the state capitol commissioners with the power and authority of appraising the value of the property upon which the capitol building was to be erected, and making an award to the owner of the same, in accordance with such appraisal, was unconstitutional in that it denied to the owner the right to have the issue as to the value of his property passed upon and determined by a jury. The supreme court upheld the validity of the statute, saying, through Field, J.: "The provision of the constitution

that 'the right of trial by jury shall be secured to all and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. . . . It is in the common-law sense that the language has always been regarded by the courts of this state. It is a right 'secured to all' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several states of the Union. It is a right, therefore, which can only be claimed in actions at law, or criminal actions, where an issue of fact is made by the pleadings. It cannot be claimed in equity cases, unless such issue be specially framed for a jury under the direction of the court. It cannot be asserted upon an issue at law, for that is a matter purely for the court. The fact, therefore, that property and rights of property may be involved in the disposition of a particular case or proceeding does not determine the right to a trial by jury. There must be an action at law, as contradistinguished from a suit in equity, and *from a special proceeding*, or a criminal action, and an issue of fact joined therein upon the pleadings, before a jury trial can be claimed as a constitutional right."

Under the common law, there was no inquisition precisely like that authorized by section 2185c of the Political Code. The nearest approach thereto were the proceedings under the writs of *de idiota inquirendo* and *de lunatico inquirendo*, which were analogous to the proceeding for like purpose under our law, whereby the question of the insanity or idiocy of one was investigated, with a view of committing him for treatment or safekeeping, if he were found to be either a lunatic or an idiot. While, in the earlier history of the common law, when the profits of the lands of one found to be an idiot or lunatic passed to the crown, the issue was tried by a jury of twelve men, yet, in later times, when mental diseases of a nature to impair the will came to be recognized as curable and appropriate subjects of governmental cognizance, proceedings looking to the determination of whether a person was of unsound mind to the extent of being unable to take care of himself and his property rights or of being dangerous to the safety of the public, were summarily conducted or prosecuted without the intervention of a jury, due provision being made

for the care and preservation of the patient's estate while he remained mentally incompetent and the return of the same and its profits to him, if he recovered from his malady, and for the proper disposition thereof should he die a *non compos mentis*. (3 Blackstone, p. 428; 1 Blackstone, pp. 303-305.)

The theory upon which such inquisitions were conducted in a summary manner or without the aid of a jury was, doubtless, that the proceeding does not involve an inquiry as to whether a crime had been committed, nor was the commitment of the patient intended as a punishment, but that its purpose was for the sole benefit of the patient, by facilitating the proper treatment for his disease and at the same time protecting his estate from being lost or destroyed by that improvidence which necessarily accompanies a defect of will or understanding or by impositions practiced upon the incompetent by those ever ready to enrich themselves by any means, however unconscionable, that may become available to them. And so it is true as to the proceeding under section 2185c of our Political Code. Said proceeding does not involve the investigation of a criminal act, nor is the detention of the patient for the period prescribed by said section penal punishment or intended as such. And, as was said by the supreme court of Iowa, in the case of *In re Breeze*, 82 Iowa, 573, [48 N. W. 991], where the main question was whether an alleged insane patient was entitled to have the question of her sanity tried by a jury: "It is purely a special proceeding, and hence, technically, not a 'civil action,' which is defined to be a proceeding in which one party, known as the 'plaintiff,' demands against another party, known as the 'defendant,' the protection of a private right or the redress of a private wrong." (See sections 22 and 30 of our Code of Civil Procedure.) The object of the statute is merely to authorize the state to take charge of and force treatment upon those so far addicted to the intemperate use of alcoholic liquors or narcotics as to have lost the power of self-control or to have become inebriates or dipsomaniacs. The legislation represents in reality the exercise only of the police power, whereby the state may control or correct the individual habits of its citizens where such habits are or may become a menace to the peace, comfort, "good-neighborhood," and health of the commonwealth. The proceeding does not involve a trial but, in analogy to the common-law proceeding in insanity cases, is a mere inquisition,

by way of a *special proceeding*, the determination of which should be left, as the law intends, largely to persons possessing the learning of experts and not to laymen, of whom juries are ordinarily composed, and who do not, nor are expected to, possess the training and learning essential to a just and intelligent solution of a scientific question such as is necessarily involved in a proceeding whose purpose is to ascertain and determine whether a person, from whatsoever cause, is suffering from some serious mental infirmity.

But the position here taken is well buttressed by authority.

In *Ex parte Ah Peen*, 51 Cal. 280, the petitioner, a minor, had been committed to an industrial school in accordance with the provisions of an act of the legislature of 1858. He claimed that his commitment was illegal because he had been denied the right, guaranteed by the constitution, to a trial by jury, and that, in denying him said right, the further provision of the constitution that no person shall be deprived of his liberty without due process of law, was violated. The court, rejecting the contention, said: "It is obvious that these provisions of the constitution have no application whatever to the case of this minor child. The action of the police judge here in question did not amount to a criminal prosecution, nor to proceedings against the minor according to the course of the common law, in which the right of trial by jury is guaranteed. The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. Having been abandoned by his parents, the state, as *parens patriae*, has succeeded to his control, and stands *in loco parentis* to him. The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are, by reason of infancy, *lunacy*, or otherwise, incapable of properly controlling themselves," citing *Ex parte Crouse*, 4 Whart. (Pa.) 1, and *Prescott v. State, etc.*, 19 Ohio, 184, [2 Am. Rep. 388].

In *In re Breeze*, 82 Iowa, 573, [48 N. W. 991], it is said: "It is urged that appellant (an alleged insane patient) was entitled to a jury trial in the district court, under the constitutional guaranties that the right of trial by jury shall remain

inviolable; and in all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial, by an impartial jury. These provisions are found in sections 9 and 10 of article I of the constitution of the state. In *Black Hawk County v. Springer*, 58 Iowa, 417, [10 N. W. 791], this court considered the rights of a person charged with insanity to a trial by jury under these provisions of the constitution, and held that they applied only to criminal prosecutions or accusations for offenses against the criminal law, where it is sought to punish the offender by fine or imprisonment."

In *County of Black Hawk v. Springer*, 58 Iowa, 417, [10 N. W. 791], (the case referred to in the Breeze case), the Iowa court thus expressed itself: "... The inquest of lunacy by a board of commissioners is in no sense a criminal proceeding. The restraint of an insane person is not designed as punishment for any act done. The insane are by the law taken into the care and custody of the state for treatment for their unfortunate infirmity. In our opinion, whatever may be thought of the power of the legislative department of the state to provide a special tribunal for the examination of persons alleged to be insane, the safeguards and limitations provided by our laws for the correction of any abuse which may arise from the acts of the commissioners are ample for the protection of the citizen."

In *Crocker v. State*, 60 Wis. 553, 556, [19 N. W. 435], the supreme court of Wisconsin says that the common-law right of trial by jury, as guaranteed by the constitutions of that and other states, extends neither to proceedings to commit infants to an industrial school or a house of refuge nor to the determination of the mere insanity of a party, and in support of this proposition cites *Ex parte Crouse*, 4 Whart. (Pa.) 9; *Prescott v. State*, 19 Ohio St. 184, [2 Am. Rep. 388]; *Ex parte Ah Peen*, 51 Cal. 280; *Petition of Ferrier*, 103 Ill. 367, [43 Am. Rep. 10]; *Milwaukee Ind. School v. Milwaukee Co.*, 40 Wis. 328, [22 Am. Rep. 702]; *Gaston v. Babcock*, 6 Wis. 503; *Shroyer v. Richmond*, 16 Ohio St. 455; *Hagany v. Cohnen*, 29 Ohio St. 82.

But we need not further multiply cases upon the proposition in hand. They are numerous and, like the cases above examined, all to the effect that, where the state constitution guarantees the common-law right of trial by jury, only those

cases in which that right was habitually exercised according to the course of the common law come within the terms of the guaranty, and that an inquisition of insanity is not one of those cases.

The cases and authorities cited by the learned counsel for the petitioner have reference to cases where the legislature has provided that the question of insanity shall be tried by a jury. In none of them, except in the case of *De Hart v. Condit*, 51 N. J. Eq. 611, [40 Am. St. Rep. 545, 28 Atl. 603], is there any declaration approaching the statement that the right to a jury trial in such cases is the common-law right. And in the case mentioned it is merely stated, as we have already explained (quoting Blackstone), that under the *old* common law, proceedings under a writ of *de idiota inquirendo* or *de lunatico inquirendo* were had before a jury, and this for the obvious reason that with the adjudication of the person's idiocy or insanity passed the issues and profits of his estate, during the existence of his infirmity, to the crown. In such a proceeding, the property rights of the alleged incompetent were to some extent involved, and quite logically, in harmony with the recognized and zealously guarded polity of the British government, after its establishment upon the conquest of William the Conqueror, with respect to the rights of property and the right to a trial by jury where those property rights are affected or questioned, the natural and appropriate mode for determining whether the subject's property should be taken from him or, substantially, escheated to the crown, in such cases, was by a jury of disinterested persons of good common intelligence. As we have already shown, after provision was made for the safekeeping and preservation of the incompetent's estate and the issues and profits thereof, to be returned to him upon his restoration or devolved upon his heirs should he die without recovering from his malady, there was no longer allowed a trial of the question of the alleged incompetent's idiocy or insanity by a jury, but the whole question was committed for determination to a court or a committee, under the direction of the court, without the intervention of a jury. And this latter system prevailed long prior to the time when Sir William Blackstone gave to the civilized world his justly celebrated and splendid commentaries on the English common law.



The De Hart case involved the question whether a statute of New Jersey expressly requiring a jury of twelve men for the determination of the question whether a person was insane or afflicted with some other mental infirmity justifying his detention amounted to a denial to the alleged incompetent of the constitutional right to a trial by jury because it provided that the sheriff should summon twelve instead of twenty-four persons for that purpose. And, as before intimated, in all the cases where it is held that one charged with insanity is entitled to have the question tried by jury, such right is purely statutory or expressly conferred by legislative mandate. Very clearly, if the section of the code in question here, like our statute governing the investigation of cases of alleged insanity (Pol. Code, sec. 2174), authorized or required the question of inebriety to be tried by a jury, such requirement, whatever its terms or conditions, if reasonable, would have to be complied with; but the right thus allowed would not be the constitutional or common-law right of trial by jury. But the legislature has not so ordained as to the trial of questions arising under section 2185c of the Political Code, nor, for reasons already given, does said section violate any of the constitutional guaranties because there is omitted therefrom a provision according to a person charged under its provisions the right of trial by jury. Indeed, if, as the petitioner contends, he is entitled to a trial by jury as of right or by virtue of the constitutional guaranty with respect to trial by jury, it would be altogether unnecessary for the legislature to declare such right in the statute.

The result of the foregoing views is, obviously, that the writ must be discharged and the petitioner remanded, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1394. Third Appellate District.—December 21, 1915.]

JESSE GRIFFITH, Respondent, v. WELBANKS & COMPANY (a Corporation), Appellant.

DAMAGES—BREACH OF CONTRACT OF PURCHASE—GROWING CROP OF APPLES—LOSS BY ELEMENTS—EXCESSIVE JUDGMENT.—In an action for damages for breach of a contract to purchase a growing crop of apples, it is error to award the plaintiff, as damages, the full contract price, without taking into account the cost of picking, nailing the shock, and hauling the apples to the designated point of shipment and putting them on board the cars, which the plaintiff was obligated to do under the terms of the contract, notwithstanding the apples were destroyed by the elements before harvesting through the alleged fault of the defendant in not furnishing the necessary materials and boxes for such purpose.

ID.—TRUE MEASURE OF DAMAGES—SECTION 3300, CIVIL CODE.—In an action for damages for breach of a contract to purchase a growing crop of apples which was destroyed by the elements before it was harvested, and was never in a condition to be delivered to the buyer, section 3300 of the Civil Code, and not section 3311, furnishes the true measure of damages.

ID.—EVIDENCE—MARKET VALUE OF APPLES.—Where there is a dispute as to the contract price of the apples, it is error to strike out testimony as to their market value.

APPEAL from a judgment of the Superior Court of Napa County, and from an order denying a new trial. Emmet Seawell, Judge presiding.

The facts are stated in the opinion of the court.

W. H. Mahony, for Appellant.

Theodore A. Bell, Dudley D. Sales, and E. S. Bell, for Respondent.

CHIPMAN, P. J.—Plaintiff commenced the action to recover the sum of one thousand seven hundred dollars for the breach by defendant of the following alleged contract:

“AGREEMENT.

“This agreement, made and entered into this twenty-third day of September, 1912, by and between Jesse Griffith, of St. Helena, California, and Welbanks & Company, a corporation,

with its principal place of business in the City and County of San Francisco, State of California,

"Witnesseth, That the said Welbanks & Company agree to purchase and does purchase and the said Jesse Griffith agrees to sell and does sell all number one apples (approximately) 4000 boxes growing on that certain tract of land leased by said Jesse Griffith at the price of (*ten [10] dollars per ton or*) fifty (\$.50) cents per box f. o. b. St. Helena.

"Jesse Griffith agrees to nail up all shook, do all the picking and hauling from the orchard to St. Helena, and when apples are ready for shipment, haul same from the packing house and load f. o. b. the cars at St. Helena, California.

"Welbanks & Company agree to supply all the necessary material, viz.: Shook, paper, nails, etc., for the packing of said crop, to haul same from railroad at San Francisco to store, and to furnish the packer for the packing of said crop. (*Pay freight on shook, apples, etc.*)

"It is further understood and agreed that after said charges and cartage have been deducted from the gross proceeds the said Jesse Griffith and Welbanks & Company shall enjoy all profits, share and share alike.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

[Signed.]

"WELBANKS & Co.

"B. C. FLOOTON, Sec.

"JESSE GRIFFITH."

It is alleged that the four thousand boxes of apples mentioned in the contract "were ready for picking, packing, and shipping on or about October 1, 1912, as the defendant then and there well knew, but the defendant, for a period of fifteen days after said apples became ready for picking, packing, and shipping as aforesaid, willfully failed, neglected, and refused to supply the necessary materials and boxes for the packing of said crop, or to furnish the packer for the packing thereof, and solely by reason of said delay, about twenty-five hundred boxes of said 'number one' apples which remained on the trees unpicked, were destroyed by wind and rain"; alleged that plaintiff was ready and willing at all times to do all the picking, etc., required of him by said contract, but by reason of defendant's said neglect plaintiff was unable "to pick any part of said twenty-five hundred boxes, or to preserve them from destruction by wind and rain as aforesaid";



that there were picked and packed "1594 boxes of said 'number one' apples," for which defendant has paid plaintiff three hundred dollars and no more, and there is now due and owing plaintiff from defendant the sum of one thousand seven hundred dollars; that plaintiff has fully performed each and every covenant in said contract by him to be performed.

Defendant denied the execution of the contract set out in the complaint but alleges that, on September 23, 1912, defendant prepared and signed in duplicate a proposed agreement in form similar to that set forth in plaintiff's complaint, except that as proposed the contract read "at the price of ten (\$10) dollars per ton or fifty (\$.50) cents per box f. o. b. St. Helena," whereas as changed by plaintiff it read, "at the price of fifty (\$.50) cents per box f. o. b. St. Helena," and there were added to the fourth paragraph the words, "Pay freight on shook, apples, etc." The words "ten (\$10) dollars per ton or" were erased by drawing ink lines through them and the added clause was written in by pen. The contract as proposed was typewritten. That as thus changed plaintiff returned one of the duplicate copies of the agreement, with a letter calling attention to the words "pay freight on shook, apples, etc.," but did not call defendant's attention to the alteration by striking out the words "ten (\$10) dollars per ton or," and defendant "had no knowledge of the striking out of said words last referred to until on or about the 3d day of January, 1913, when its attention was directed thereto by letter from plaintiff and after all the apples hereinafter described had been shipped, and the contract hereinafter alleged had been performed and executed by the defendant herein." It is then alleged that the document set forth in the complaint is but one of a number of paper writings signed by the parties; that it was not the intent of plaintiff to sell and defendant to buy the apples referred to, but that the transaction was to be a joint venture, except that plaintiff was to be guaranteed ten dollars per ton for all No. 1 apples shipped to defendant, and the terms of the agreement actually entered into were as follows: Plaintiff was to harvest the crop and haul it to the packing-house to be packed; he was to nail up all shook and to haul all said crops, after it was so packed, to the depot at St. Helena and place the same aboard the cars for shipment to San Francisco, and to receive in payment therefor ten dollars per ton, estimated at about twenty-three cents



per box, and it was likewise agreed that the cost of packing, including the materials required therefor, together with said ten dollars per ton or twenty-three cents per box, would be fifty cents per box; that defendant agreed on its part to advance the cost of supplying materials for packing, namely, shook, paper, nails, etc., and the labor and service of packers, advance the cost of freight on shipments by rail and cartage at San Francisco, and to sell the apples at the best market price; that upon making sales all charges, including the material and cost of labor for packing and said guaranteed ten dollars per ton (or twenty-three cents per box) of apples and all charges for freight and cartage at San Francisco, were to be deducted from the gross proceeds of sales and the net profits, if any, were to be divided equally between plaintiff and defendant; that the words "price of fifty cents per box f. o. b. St. Helena," as appear in said document set forth in plaintiff's complaint, referred to "the estimated cost of said apples after payment of said \$10.00 per ton to plaintiff and payment of the cost of the material and labor furnished for packing the same for shipment at St. Helena." The answer denies the averments of the complaint as to the alleged number of boxes of apples ready for shipment October 1, 1912, or at any time; denies that defendant refused to supply the necessary materials for boxes; denies that by reason of any delay on defendant's part to furnish boxes, two thousand five hundred or any number of boxes of said apples remained on the trees unpicked and were destroyed by wind or rain; denies that plaintiff was ready or willing to do the part of the work which he agreed to do; and denies that plaintiff solely or at all was unable to pick any boxes of apples or to preserve them from destruction by wind or rain through any neglect or refusal of defendant; denies that plaintiff packed or delivered to defendant 1,594 boxes of No. 1 apples pursuant to any agreement, or that defendant paid plaintiff any money other than under the agreement set out in the answer; denies that there is any money due plaintiff from defendant other than as alleged in the answer; that plaintiff packed and shipped 1,593 boxes of apples, of which only 1,034 were No. 1 apples and that 559 boxes were smaller in size and of less marketable value, and that defendant sold said 1,593 boxes to the best advantage and realized therefrom \$1,228.85 and no more; alleges that defendant paid out on account of said charges

certain stated sums, and that the share of the net profits to which plaintiff is entitled is the sum of \$231.85, which defendant offered to pay plaintiff prior to the commencement of the action, but plaintiff refused to accept the same, and that defendant paid into court said sum of \$231.85. Defendant prays judgment in favor of plaintiff for said last named sum and that defendant recover costs of suit. The cause was tried with a jury and plaintiff had the verdict of one thousand two hundred dollars. Defendant appeals from the judgment and from the order denying its motion for a new trial.

Plaintiff estimated that there were four thousand five hundred boxes of No. 1 apples on the trees when the contract was made. In the contract the estimate was four thousand boxes (approximately). He shipped 1,593 boxes. In his testimony plaintiff testified that of the apples "blown off the trees on account of wind and rain, I figured from 2,500 to 3,000 boxes were number one apples." Under the contract plaintiff was to "nail up all shook, do all the picking and hauling from the orchard to St. Helena and when apples are ready for shipment, haul same from the packing house and load f. o. b. the cars at St. Helena, California." Plaintiff testified at some length as to delays in sending packing materials and packers; that there were not enough packers to keep up with the picking and that some of them were incompetent; that by reason of defendant's failure to perform its part of the agreement in these and other particulars the picking and packing ran along so late in the season that about two thousand five hundred or three thousand boxes of apples were destroyed by wind and rain storms. He testified that 1,593 boxes of apples were packed and shipped and none of them rejected, and that he had received on account three hundred dollars; that his orchard was on Howell Mountain, eight miles from St. Helena. Other witnesses testified to facts tending to establish plaintiff's contention that the destruction of his crop of apples was attributable to defendant's failure to perform its part of the contract. There was evidence submitted by defendant in conflict with plaintiff's testimony.

Defendant's answer and its evidence was in effect that the contract agreed upon and under which plaintiff and defendant acted was one of profit-sharing, by which plaintiff was guaranteed ten dollars per ton or twenty-three cents per box, and after the various charges referred to in the contract and the

cost of marketing the fruit were deducted, plaintiff and defendant were to share equally whatever profits there might be. Plaintiff testified that there was no such understanding. Defendant called witnesses who testified in support of its contention and introduced letters written by plaintiff to defendant during the course of the packing and up to the close of the transaction, which seem to support defendant's position. At no time prior to January did plaintiff make any claim for apples destroyed by winter storms or that defendant was responsible for the loss. However, if the jury was justified from sufficient evidence in finding that the loss was caused by defendant's failure to perform its duty under the contract and plaintiff was free from fault, which we do not now deem it necessary to decide, and, if the jury were justified from the evidence in finding that defendant agreed to pay plaintiff fifty cents per box net for his apples and not ten dollars per ton, or twenty-three cents per box, and that there was no agreement to share profits as part consideration for the sale, issues upon which we express no opinion, there remains the question: Was the amount of the verdict justified by the evidence?

It is conceded that in estimating damages the jury allowed fifty cents a box on three thousand boxes of apples, less three hundred dollars paid on account, but took no account of the cost of picking, nailing the shook, and hauling the apples to St. Helena and putting them on board the cars. Plaintiff justifies the verdict on the ground that as the apples were destroyed there was no occasion for incurring the expense of these charges, and defendant cannot complain, because in any event its liability was to pay fifty cents per box. Except where otherwise expressly provided by the Civil Code, the measure of damages "for the breach of an obligation arising from contract . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, sec. 3300.) Where the title to personal property is vested in the buyer, the detriment caused by his breach of the agreement to accept and pay for the property "is deemed to be the contract price." (Civ. Code, sec. 3310.) "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: . . .

2. If the property has not been resold in the manner pre-

scribed by section 3049 [i. e., sold to enforce a lien, not this case], the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it." (Civ. Code, sec. 3311.)

Clearly, the title to the property involved in the present case was not vested in defendant, and section 3310 has no application. Where, as here, the property consisted of a growing crop which was destroyed by the elements before it was harvested, and was never in a condition to be delivered to the buyer, we do not think section 3311 furnishes the true measure of damages. The just and equitable measure is found in section 3300. Plaintiff was to receive, upon his view of the contract, fifty cents per box for his apples after he had picked, packed, and hauled them to St. Helena and delivered them on board the cars. Upon no just principle can he recover the full contract price, for the detriment to him is at most the contract price less the expenses he would have incurred had he delivered the apples.

In *Coburn v. California etc. Co.*, 144 Cal. 81, 84, [77 Pac. 771], the contract was for the sale of cement clay at a stated price per cubic yard on delivery. Defendant received a certain quantity and refused to receive any more. After referring to section 3311 of the Civil Code, the court said: "Where, however, there is no value, or where under the terms of the special contract the market value is not an appropriate or adequate criterion of damages, it has been said that the measure of damages is compensation for the actual loss suffered. (24 Am. & Eng. Ency. of Law, 1115.) The law seeks to give the complaining party the value of his bargain—to prevent a loss which the fulfillment of the contract would have prevented—to put the injured party, so far as money can do it, in the same position as if the contract had been performed. (8 Am. & Eng. Ency. of Law, 632.) Accordingly, the contract price less the cost of performing the contract was held to be the proper measure of damages when the buyer refused to take all the tomatoes grown on a certain tract of land, it appearing that there was no other market for the tomatoes." (Citing cases. See *O'Connell v. Main etc. Hotel Co.*, 90 Cal. 515, [27 Pac. 373].)

In *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, [143 Pac. 253], there was a breach of a contract by failing to furnish water for the irrigation of a crop of potatoes, in consequence of which the yield was less than it would have been had sufficient water been supplied. We held in that case that section 3300 of the Civil Code furnished the rule for measuring the damages, namely, the market value of the potatoes at the selling place less the expenses incurred in growing and marketing the crop. Plaintiff offered no evidence of market value at the selling place or elsewhere. The jury had no criterion by which to measure the damages except the contract price of the apples and the estimated quantity destroyed.

In its answer defendant denied the execution of the contract sued upon; denied that in its altered form it expressed the intention of the parties, and set forth in much detail what it claimed was the contract as shown by the acts, the verbal agreements, and correspondence of the parties; that the price guaranteed plaintiff was ten dollars per ton or what both parties estimated would be twenty-three cents per box, in addition to which plaintiff was to share equally with defendant in the profits. In a letter written by plaintiff to defendant, September 18, 1912, when negotiations were progressing for the sale and purchase of the apples, plaintiff stated that the price for the apples was figured at ten dollars per ton in enumerating the different items making up fifty cents per box. Upon the issues as presented by the pleadings, plaintiff claiming fifty cents per box net, more than double the amount defendant claimed was the contract, defendant was entitled to any evidence which would legitimately tend to discredit plaintiff's claim and sustain defendant's claim. Defendant's witnesses testified that the market value of apples at St. Helena, such as were involved, was \$12 per ton. The court afterward struck out this testimony and defendant excepted to the ruling. We think this was error, for, had the jury believed the testimony of these witnesses, it would have had some tendency to show that plaintiff's claim was unreasonable and that defendant would not have been likely to enter into a contract to pay twice the market value of the apples.

We refrain from discussing the sufficiency of the evidence to sustain the implied finding of the jury that the contract

was as contended by plaintiff, for the reason that should another trial be had the evidence may not be the same as at the first trial.

The judgment and order are reversed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 1435. Third Appellate District.—December 21, 1915.]

JAMES A. SNOOK et al., Appellants, v. Mrs. ALICE PAGE,
Respondent.

CONTRACTS—SALE OF REAL ESTATE—BROKER'S COMMISSION.—A contract authorizing real estate brokers to sell property which makes the brokers the exclusive agents for the sale of the property but does not clothe them with the exclusive right to sell the property, does not entitle the brokers to a commission on a sale made by the owner unaided by the agents.

ID.—RATIFICATION—SALE BY OWNER.—The sale by the owner does not constitute a ratification within the meaning of a contract providing that the owner shall be liable for commission on any sale made by the agents, "or ratified" by the owner during the life of the agreement.

ID.—DEFINITION OF "RATIFICATION."—The terms "adopt" and "ratify" are properly applicable only to contracts by a party acting or assuming to act for another.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

H. B. M. Miller, for Appellants.

Robinson & Robinson, and Harry L. Price, for Respondent.

BURNETT, J.—The appeal is from a judgment of nonsuit in an action for the recovery of \$3,630, claimed as commissions for the sale of real property. The contract of agency, as far as necessary to quote, was as follows:

"For value received, and in consideration of the agreement on the part of Snook & Nelson, hereinafter contained, to

perform services for me, I appoint said Snook & Nelson, my agents, and as such authorize them to sell for me within one hundred and twenty days from date hereof, the following described property: . . . Said property may be sold as a whole or in such subdivisions as herein stated, provided that the entire selling price shall not be less than \$20,000.

"I hereby empower said Snook & Nelson solely to contract in writing to sell said property with the same effect as if I were present and authorized the same. . . . I agree to pay to Snook & Nelson 5% commission and one-half of price obtained above \$20,000, commission on any sale made by them or ratified by me during the life of this agreement, or thereafter if sold to purchaser to whose attention said property was brought through them."

It is not claimed that plaintiffs made a sale or obtained a purchaser, but it is conceded that defendant, without any aid from or consultation with them, made a contract for the sale of the property. It is contended, however, that, under the peculiar terms of their contract, plaintiffs were entitled to a commission if a sale were made by the owner of the property. The proper construction of said contract of agency is, therefore, the desideratum in the case.

The first question of importance, then, is whether the plaintiffs were constituted the *exclusive agents* or were they given the exclusive *right* to sell said property.

If the former only, the rule is well settled that "the owner has the right to sell the same by his own unaided efforts without becoming liable to the broker for commission; that the only effect of such contract is to prevent the owner from placing the property in the hands of another agent and that the owner does not thereby relinquish his right to sell the property himself independently of the broker." (*Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606; *Waterman v. Boltinghouse*, 82 Cal. 659, [23 Pac. 195; *Dreyfus v. Richardson*, 20 Cal. App. 800, [130 Pac. 161].)

The right on the part of the owner is an implied condition of the agency, subject to which the agent accepts it, and as his commission is payable only in case of his success in finding a purchaser, the agent takes his chances of the owner himself making the sale. (*Dole v. Sherwood*, 41 Minn. 535, [16 Am. St. Rep. 731, 5 L. R. A. 720, 43 N. W. 569].)

The contract herein certainly does not expressly confer upon plaintiffs the exclusive right to sell the property, nor does it in apt terms, if at all, provide for a commission in case the owner himself should dispose of it.

In considering the matter we are to keep in mind that the burden is upon plaintiffs to establish their claim, and that, since the contract was prepared by them, any uncertainty or ambiguity in the terms of the instrument must be resolved in favor of the owner.

With this in view, then, taking the contract "by the four corners," we reach the conclusion that plaintiffs were made the exclusive agents but they were not clothed with the exclusive right to sell the property. The use of the word "solely" can furnish the only pretense of justification for the contention of plaintiffs but, fairly interpreted, the clause imports the meaning of sole agency. If it had been the intention to deprive the owner of the right to sell, or in case of such sale to create a liability for commissions, it could and, no doubt, would have been easily and clearly expressed. With such contingency in view the parties would have provided that "Snook & Nelson should have the exclusive right to sell said property," or, "in case of a sale made by the owner they should be entitled to the same commissions as though made by themselves."

The fact is that by the clause under consideration the parties were not treating of an actual sale, nor did they contemplate any personal participation of the owner in the transaction. The language shows that they were considering a *contract* or agreement for the sale rather than the *sale* itself, and such contract made in the absence of the owner, which, of course, excludes by implication the consideration of what might be done by the owner herself in consummating a transfer of the property. In this respect the contract in *Davis v. Van Tassel*, 107 N. Y. Supp. 910, was apparently more favorable to the broker than the one involved herein, but in that case the court said: "No doubt a contract could be made whereby, in consideration of the efforts made by an agent to sell property, the owner might obligate himself to pay a sum agreed upon if the premises were sold even without the aid of the broker; but it does not seem to me that this is such a contract. The plaintiff is constituted the recognized sole

agent for the property; but there is nothing in the fact of sole agency which in itself gives the broker any right to commissions, unless he is the procuring cause of the sale."

It was further held that the words: "And at such times as a sale shall be effected for any of the above mentioned property for the prices named . . . I agree to pay upon the sum of 2 per cent . . . at such times as such sales are effected," referred to sales made by such agents and did not include a sale made by the owner himself.

The cases cited by appellants involve an entirely different contract from the one before us.

In *Crane v. McCormick*, 92 Cal. 176, [28 Pac. 222], by the terms of the contract the brokers were authorized to sell the property at any time within one year, and it was expressly agreed that the commissions should be paid if the owners withdrew the property from sale or effected a sale in any way during the year. The owners *did* make a sale during the year and, therefore, one of the conditions happened that rendered them liable for the commission.

In *Maze v. Gordon*, 96 Cal. 61, [30 Pac. 962], the contract provided that if the owner should, before the expiration of the contract, withdraw the sale of the property, the broker should be entitled to his commission, and it was properly and necessarily held that since the owner did withdraw the property from sale within said time, the broker was entitled to his commission.

In *Kimmell v. Skelly*, 130 Cal. 555, [62 Pac. 1067], the owner specifically agreed: "That a commission is to be paid in the event of a sale of said real property by them or anyone else *including myself*."

In those cases and some others cited it may be said the principal controversy was as to whether there was sufficient consideration for the agreement. There was no such dispute, as herein, over the interpretation of the contract itself.

The other point, that the owner is liable for the reason that she ratified the sale, is even less tenable. The contention is that she ratified the sale by making it. This would certainly be a strange and extraordinary use of the term "ratify." We must assume that the parties attached to the term its ordinary and usual signification.

In *Norton v. Shelby County*, 118 U. S. 425, [30 L. Ed. 178, 6 Sup. Ct. Rep. 1121], it was held: "To ratify is to give

validity to the act of another and implies that the person or body ratifying has at the time power to do the act ratified."

In *Heyn v. O'Hagen*, 60 Mich. 150, [26 N. W. 861], it was said: "To ratify is to give sanction and validity to something done without authority by one individual in behalf of another."

In legal phrase, it usually means to approve or confirm by a principal what has been done by an agent or one assuming to act for another. (*City of Lexington v. Lafayette County Bank*, 165 Mo. 671, [65 S. W. 943].)

"The terms 'adopt' and 'ratify' are properly applicable only to contracts by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption or ratification there must be some relation, actual or assumed, of principal and agent." (*Shepardson v. Gilette*, 133 Ind. 125, [31 N. E. 788].)

In 33 Cyc., page 1528, "ratification" is defined as "The act of giving sanction and validity to something done by another; the adoption by a person as binding upon himself of an act done in such relations that he may claim it was done for his benefit although done under such circumstances as would not bind him but for his subsequent assent. The approval by act, word or conduct of that which was attempted (if accomplished) but which was improperly or unauthorizedly performed in the first instance. The confirmation of a previous act done either by the party himself or another. The confirmation of a voidable act. A definition of establish."

As used in the code, the term undoubtedly refers to the act of another. (See secs. 2310 and 2312, Civ. Code.)

The act of defendant in selling the property was, of course, the act of the principal and, moreover, it was an entirely valid act. It was not voidable in any sense, even though it should be held that the brokers were given the exclusive right of sale. For this exclusive right of sale would only mean that they were entitled to their commission no matter how or by whom the sale was effected.

We think the decision was right, and the judgment is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1775. Second Appellate District.—December 23, 1915.]

DABNEY OIL COMPANY (a Corporation), Respondent, v. **PROVIDENCE OIL COMPANY OF ARIZONA** (a Corporation), et al., Defendants and Respondents; **A. H. BUTLER & COMPANY** et al., Interveners and Appellants.

APPEAL—ORDER DISMISSING ACTION AS TO CERTAIN DEFENDANTS—DISMISSAL OF APPEAL.—An appeal from a judgment dismissing an amended complaint in intervention as to certain defendants, but leaving the question undetermined as to other defendants, should be dismissed, as the order of dismissal is not a final judgment and determination of the action.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Valentine & Newby, for Appellants.

Hunsaker & Britt, and Murphey & Poplin, for Defendants and Respondents Midway Royal Petroleum Company et al.

N. P. Moerdyke, for Plaintiff and Respondent.

Kemp, Mitchell & Silverberg, George E. Whitaker, and J. S. McKnight, for Other Defendants and Respondents.

CONREY, P. J.—In this action a complaint was filed by the Dabney Oil Company to establish the plaintiff's ownership of certain oil-bearing lands and to have certain of the defendants declared trustees for the plaintiff of property held in possession by them, and for an accounting. After the filing of plaintiff's complaint an election of directors of plaintiff corporation was held and the control of the corporation passed from a board of directors which was acting in harmony with A. H. Butler & Company (a corporation) and others associated with them as stockholders in the Dabney Oil Company, to a new board of directors controlled by certain of the defendants. Under its new control the plaintiff caused a substitution of attorneys to be made herein and moved for a dismissal

of plaintiff's action as against the defendants A. T. Jergins, Palladium Investment Company, a corporation, and Midway Royal Petroleum Company, a corporation. At the time of substitution of a new attorney for the plaintiff corporation the court by order gave leave to said A. H. Butler & Company et al. (appearing by the same attorneys who had theretofore been employed as attorneys for the corporation), to file a complaint in intervention. That complaint was filed, and later an amended complaint in intervention was filed by the same interveners. The motion for dismissal of the action of the plaintiff as against the three defendants above mentioned and the demurrer of those defendants to the amended complaint in intervention came on for hearing at the same time. After argument it was ordered that the motion be granted; also that the demurrer of those three defendants to the amended complaint in intervention be sustained without leave to amend, and it was ordered that the action be dismissed as to the defendants Midway Royal Petroleum Company, A. T. Jergins, and Palladium Investment Company, and that the amended complaint in intervention be dismissed as to said defendants. The defendants named in the amended complaint in intervention are the same as the defendants named in the principal complaint. So far as the record shows, the action remains pending as to seven defendants other than the three affected by said orders of dismissal. The interveners have attempted to appeal "from the judgment of dismissal as to the defendants Midway Royal Petroleum Company, A. T. Jergins, and Palladium Investment Company, rendered in the above-entitled action on the first day of April, 1913, and from the whole of said judgment."

The respondents claim that the appeal should be dismissed, for the reason that the order of dismissal was not a final judgment and determination of the action. As authority for the proposition insisted upon by them they refer us to *Nolan v. Smith*, 137 Cal. 360, [70 Pac. 166], and other cases cited in their brief. In response to these cases appellants direct attention to *Stick v. Dickinson (Goldner)*, 38 Cal. 608, and other cases, which hold that an appeal lies where an order has been made refusing to allow the filing of a complaint in intervention, or where a judgment of dismissal has been entered against the interveners after an order sustaining a

demurrer to their complaint. In *Baxter v. Boege*,* (Civ. No. 1763), wherein our decision was filed on the twenty-first day of December, 1915, we have discussed those decisions and outlined our views upon the subject. We agree that if the order appealed from herein had been an order or judgment dismissing the intervention as to all of the parties, the interveners would have the right to appeal therefrom. But since the order does not attempt to dispose of all of the issues involved in the intervention, but is only a partial determination thereof, the case is the same as where a dismissal is granted as to some but not all of the defendants to the action and the plaintiff attempts to appeal therefrom. As held in *Baxter v. Boege, supra*, such right of appeal does not exist.

For these reasons we conclude that the objections made by respondents to further consideration of this appeal should be sustained, and the appeal is dismissed.

James, J., and Shaw, J., concurred.

[Civ. No. 1772. Second Appellate District.—December 24, 1915.]

IMPERIAL WATER COMPANY No. 1 (a Corporation),
Appellant and Respondent, v. LUCY WORES et al.,
Respondents and Appellants.

IRRIGATION CORPORATION—CONSTRUCTION OF WASTE CANAL—LOCATION—

IMPLIED CONSENT.—Where a corporation organized for the purposes of securing water for irrigation and distributing the same among its stockholders is requested by the owner of a tract of land adjoining the territory watered by the irrigation system to construct a waste canal along the southerly line of such tract, for the purpose of preventing the flooding of the same from waste waters, and the corporation in complying with the request constructs the canal diagonally across such tract instead of in the place requested, and the owner makes objection thereto prior to completion of the construction, but thereafter notifies the corporation that she intends to make use of the canal for the purpose of irrigating her own land, such notification constitutes an implied consent to such construction, and the completion by the corporation likewise constitutes a consent to such user by the owner.

*On February 17, 1916, this case was by order of the supreme court transferred to the supreme court for further hearing.

ID.—ACTION TO QUIET TITLE—INJUNCTION—COSTS.—In an action by the corporation to quiet its title or right to the use of the waste canal across the land of such owner, and to enjoin the latter from maintaining any obstruction which will in any manner interfere with the free ingress or egress of the plaintiff for the purpose of cleaning, repairing, or inspecting such canal, and from obstructing in any way the flow of water therein, the plaintiff is entitled to its costs, notwithstanding the suit is in equity and includes the right to an injunction.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

F. P. Willard, for Plaintiff.

Conkling & Brown, for Defendants.

CONREY, P. J.—At all times mentioned in the complaint the plaintiff was a corporation organized for the purposes of securing water for irrigation and other purposes and for distribution of the same at cost, among its stockholders only, for use upon lands owned by them within certain described limits in the county of Imperial, and has been engaged in distributing upon said lands a large amount of water which it receives at the southerly boundary of its territory and distributes through a system of canals and ditches. The defendant Lucy Wores, in the year 1905 or prior thereto, became the owner of a tract of land, known as Tract No. 74, situated immediately north of the territory watered by the plaintiff's irrigation system. The canal system of plaintiff extends in a northerly direction through its territory, and the canals converge in the northerly part of this territory and discharge their surplus and waste water into a canal designated as the Rose Waste-way. Prior to the year 1906, there was a well-defined watercourse known as the Salton River, later called the Alamo River, which ran across a portion of Tract 74, but in a more northerly direction than that taken by the present Rose waste canal. This watercourse carried the overflow water from the Colorado River whenever any was discharged, and also carried the rain-water which fell, when any such rain-water did fall, over a considerable part of the territory covered by the water system of the plaintiff. Such rainfall

and overflow water was thus carried over and through Tract 74 to lower lands lying farther to the north. Since March 1, 1904, plaintiff has continuously conveyed and discharged waste water from its canal system across and beyond said Tract 74.

At all times mentioned in the complaint the defendant Charles R. Wores was the agent or representative of the defendant Lucy Wores in the transactions referred to herein. In the years 1905 and 1906 the defendants complained to plaintiff of the discharge and flow of waste and excess water going through plaintiff's Rose canal from the south, and complained that the water was flooding Tract 74, and requested the plaintiff to construct a ditch or canal from the said Rose Waste-way south of Tract 74 in such a way as to prevent the flooding of Tract 74, and requested that such canal be constructed along the south line of Tract 74 from the southwest corner of that tract easterly past its southeast corner to a deep gulch known as the Alamo Cut-off. In April, 1906, after making surveys, the plaintiff concluded to build such waste canal, not along the south side of Tract 74, but upon a diagonal line running through that tract northeasterly. Thereupon it proceeded to construct the canal upon such diagonal line and completed the work in December, 1906. The defendants were without knowledge of the selection of this diagonal route, or that plaintiff intended constructing the canal through the tract, until the same was partially constructed. They gave no prior consent thereto other than their request for the construction of a canal along the south line of their tract, as before stated. In April, 1906, at a time after the commencement of the construction of this canal or ditch, the defendants learned of the work that was going on and protested to plaintiff and objected to the place where the canal was being constructed. Shortly thereafter the defendant Lucy Wores notified plaintiff that she intended to make use of this canal herself for the purposes of conducting waste water over and irrigating her land. The canal having been completed, plaintiff began to use it as a waste-way for its surplus water and ever since has so continued without interruption, except as will be herein stated. In January, 1908, defendants placed an obstruction consisting of a check and gate so arranged that they could dam up the water flowing in this waste ditch and divert the water there-

from so as to irrigate a portion of Tract 74. In January, 1909, defendants commenced to irrigate and cultivate this land and have ever since continued so to do, and have irrigated such land by checking up the water in the waste canal and diverting the water therefrom, thereby causing the banks of the Rose Waste-way to overflow and discharge water upon the roads, fields, and crops of those adjoining that canal, to the annoyance and detriment of the plaintiff and its stockholders. The plaintiff and its officers and directors have at all times known that the defendants have obstructed this waste canal and used the water therefrom for irrigation, and until shortly prior to the commencement of this action never made any objection thereto. The action was commenced by filing of the complaint herein on June 26, 1912. About one year prior thereto plaintiff removed the check theretofore placed in the canal by the defendants, in order that plaintiff might clean out the canal, but immediately thereafter plaintiff replaced said check by a similar structure more substantial than that theretofore placed in the canal by the defendants. This replacement was made by the plaintiff for the convenience of the defendant Lucy Wores and in order that she might continue to irrigate her said land. The Rose Waste-way is a necessity to the canal system of the plaintiff, and it is impracticable to operate and maintain plaintiff's system without such waste-way or some available substitute therefor. Shortly before the twentieth day of June, 1912, the plaintiff entered upon said canal and tore out the check and gate which it had constructed as above stated and destroyed the same. Two days later the defendants re-entered upon the canal and by the erection of a barbed-wire fence excluded and ejected the plaintiff therefrom and placed a temporary check in the canal (near the place from which the former check had been removed) for the purpose of enabling them to divert water from the waste canal for irrigation, as they had been accustomed to do.

The plaintiff by this action seeks a decree quieting its title or right to the use of said waste-way across the land of the defendants, and enjoining the defendants from maintaining any obstruction which will in any manner interfere with the free ingress and egress of the plaintiff or its employees for the purpose of cleaning, repairing, or inspecting the waste-way, and further enjoining the defendants from obstructing in

any way or for any purpose the flow of water therein. Upon sufficient evidence the court found the facts to be as we have stated them, and likewise found "that since the construction of said waste-way across the said Tract 74, the defendant Lucy Wores has consented to the maintenance thereof subject to her right to use the same for irrigation in the manner in which she has used the same as aforesaid, and has not consented otherwise."

In accordance with its conclusions of law following the findings of fact, judgment was rendered to the effect that "upon the restoration and reconstruction by plaintiff of the check torn out and destroyed about the 1st of June, 1912, and in substantially the same condition, location, and position as the same existed at the time the same was removed therefrom and destroyed by plaintiff, and not otherwise, plaintiff is entitled to use the waste canal described in the complaint, across the lands of defendant Lucy Wores, and to discharge its surplus waters therethrough in the same manner that it has been accustomed to discharge the same, subject always to the right of the defendant Lucy Wores to obstruct and divert such waste water by means of said check or irrigating so much of said Tract 74 as she has been accustomed to irrigate previous to the said June 26, 1912, and no more. It is ordered and adjudged that in diverting the said waste water defendant shall not check said water to any higher level than that to which she checked the same prior to June 26, 1912. It is further ordered that any check placed in the said waste-way by plaintiff shall be so constructed as to permit all water in excess of that being diverted by defendant to flow down the said waste-way without interference, and that when not in use such check and obstruction shall be so removed as to permit the free flow of water and the scouring of the channel of said waste-way above said check of all deposits of silt. It is ordered and adjudged that plaintiff is entitled to convenient ingress and egress from the said canal for the purpose of cleaning and caring for the same, and that such right extends over the strip of ground eighty feet in width; that is to say, forty feet on each side of the center line of said canal. It is further adjudged and decreed that the defendant Lucy Wores is entitled to enter upon the said strip of land at all times for the purpose of maintaining, repairing, and caring for the said check in the said canal so used by her for the purpose of

diverting water therefrom for the irrigation purposes aforesaid, and for the purposes of making such diversion of water. It is further ordered and decreed that defendant Lucy Wores recover her costs therein taxed at \$——." The plaintiff appeals from certain specified portions of this judgment, including in the appeal substantially all of it except the sentence defining plaintiff's right of way and its right of access thereto. The defendants appeal generally from the judgment. The record consists of the judgment-roll and the notices of appeal.

The plaintiff claims that it is entitled to this waste-way because at considerable expense it was constructed under a parol license and under circumstances which should now estop the defendants from destroying its efficiency. We have no doubt that a right of way may be thus obtained by virtue of an executed parol license. The circumstances being sufficient to create an estoppel, "the license becomes in all essentials an easement." (*Crescent Canal Co. v. Montgomery*, 143 Cal. 248, [65 L. R. A. 940, 76 Pac. 1032]; *Stoner v. Zucker*, 148 Cal. 516, [113 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 Pac. 808].) The request made by the defendants that the plaintiff construct a waste ditch along the south side of their land was not a consent to the construction of such a ditch diagonally through such land. Knowledge by the owner that the work was being done without her permission was promptly followed by a protest from her, and this of course indicates that she did not consent thereto and was giving no license therefor. Following this, however, she informed the plaintiff that she intended to make use of the ditch for the purpose of irrigating her land by using thereon some of the waste water flowing through the ditch. This constituted by implication a consent that the plaintiff might build the ditch. On the other hand, if, without any other or different consent of the owner (and such seems to be the fact), the plaintiff completed the construction of its ditch, it may reasonably be inferred that the plaintiff intended thereby to consent to such use of the ditch by the defendants. That this was the understanding on the part of the plaintiff is evidenced by the fact that subsequently, when it found that a check and gate had been arranged in the ditch for irrigation purposes by the defendants, and when it became necessary for plaintiff temporarily to remove this obstruction in the course of repairs to the

ditch, it immediately thereafter replaced the check by a similar and more substantial structure, and so placed the same for the convenience of the defendants in order that they might continue to irrigate their land. Under these circumstances, when the plaintiff on or about the 1st of June, 1912, destroyed the gate theretofore established by it, this was a wrongful denial of a limitation under which its continuing right to maintain the ditch exists. Plaintiff's counsel contends that the facts found do not authorize a judgment requiring the plaintiff to restore and reconstruct the check torn out by it from the ditch. The judgment does not require the plaintiff to do anything; it merely imposes upon it the condition that it must do a certain thing as a necessary incident to the enforcement of a certain right. It is required to do equity in a matter incidental to its right to have affirmative relief in equity. Having complied with that condition, it is permitted to discharge its surplus water through the ditch in the same manner that it has been accustomed to discharge the same, and suitable provision is made for the free flow of the water, subject only to the temporary checking of that flow during times of irrigation of the land of the defendants by the use of such waste water.

It should be distinctly understood that this case does not attempt to settle or determine any right or claim of the defendants to have any water continue to flow through the Rose canal or ditch or across said Tract 74. We are dealing solely with the ditch or canal itself and the right of the defendants to a certain limited use of the ditch for the diversion of water therefrom whenever such water is by the plaintiff permitted to flow therein.

Plaintiff objects to the provision in the decree that the defendant Lucy Wores recover costs, and insists that the costs should be allowed in favor of the plaintiff. We are referred to Code of Civil Procedure, section 1022, subdivision 5, which provides that costs are allowed of course to the plaintiff upon a judgment in his favor in an action which involves the title or possession of real estate. Although the suit is in equity and includes the right to an injunction, it is primarily an action to quiet title to a right in real property. It has been held that where the plaintiff has any judgment in his favor in an action to quiet title, though it be for only a part of the property, the costs should be in favor of the plaintiff.

(*Sierra Union etc. Co. v. Wolff*, 144 Cal. 430, [77 Pac. 1038].) And there seems no doubt that the right claimed by the plaintiff herein is a right to real property. (*Lower Kings R. W. D. Co. v. Kings R. & Fresno C. Co.*, 60 Cal. 408.) It is true that a mere license revocable in its nature would not amount to an interest or estate in the land. (*Emerson v. Bergin*, 76 Cal. 197, 201, [18 Pac. 264].) But where the right, although originating in a license, exists for the benefit of the licensee's land and has become irrevocable, its character becomes that of an easement which is an interest in real property within the meaning of the code section above mentioned. (*Schmidt v. Klotz*, 130 Cal. 223, [62 Pac. 470]; *Stoner v. Zucker*, 148 Cal. 516, [113 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 Pac. 808].)

Concerning the plaintiff's claim that the defendants had not maintained a check in the canal and had not used the ditch for a period of five years, and therefore that the defendants had not acquired any prescriptive right therein, a sufficient answer is that the right of the defendants, so far as recognized by the judgment herein, is not based upon adverse use, but solely upon the condition inhering in the plaintiff's right of way as we have construed it in this opinion.

The judgment is modified by striking therefrom the provision contained therein allowing costs to the defendant Lucy Wores, and the court below is directed to further amend the judgment by allowing costs to the plaintiff. As so amended, the judgment shall stand affirmed.

James, J., and Shaw, J., concurred.

[Crim. No. 602. First Appellate District.—December 27, 1915.]

THE PEOPLE, Respondent, v. EDWARD M. DATES,
Appellant.

CRIMINAL LAW—EMBEZZLEMENT OF LEGACY—VENUE.—In the prosecution of an executor for the embezzlement of a legacy, it cannot be contended that the venue of the offense was not proved as laid in the indictment, because of the fact that the defendant was in another county between the date of the order directing the payment

of the legacy and the date of the order for the attachment of his person for his refusal to comply with such order, and from the latter date to the date of his indictment was confined in jail in the county in which the venue was laid.

ID.—COMMISSION OF OFFENSE—TIME.—The time of commission of such an offense is not limited to the period following the date of the order directing payment of the legacy by the executor, as the title of the legatee thereto does not take its inception from the date of such order, but from the date of death of the testator.

ID.—EVIDENCE—DECREE OF PARTIAL DISTRIBUTION.—In such a prosecution, the decree of partial distribution directing the payment of the legacy is properly admitted in evidence, as the basis of the legatee's demand for the delivery of the legacy, notwithstanding that such decree had not become final through the expiration of the period within which it might have been appealed from at the time of its offer and admission in evidence.

ID.—PETITION FOR LEGACY—WAIVER OF INFORMALITIES.—There is no error in admitting such decree in evidence by reason of the fact that the petition therefor was not signed by the legatee herself, but by her attorney, nor by the fact that she was a minor at the date of the filing, where it is shown at the time of the hearing of the petition that she was of age and personally appeared, and that the defendant also appeared and resisted her application.

'**APPEAL** from a judgment of the Superior Court of Marin County, and from an order denying a new trial. Emmet Seawell, Judge presiding.

The facts are stated in the opinion of the court.

Walter J. Thompson, and H. F. Marshall, for Appellant.

U. S. Webb, Attorney-General, and Frank L. Guereña, for Respondent.

RICHARDS, J.—This is an appeal from a judgment of conviction of the defendant under indictment and conviction for embezzlement, and from an order denying a new trial.

The facts, which in the main are undisputed, are as follows: The defendant was the husband of Bessie S. Dates, deceased, and the stepfather of Mildred Jane Porter, the complaining witness before the grand jury. The wife of the defendant died in February, 1912, leaving a will, of which the defendant became and was the executor up to the time of the indictment. The estate of the deceased amounted in value to

\$64,804.40, of which the sum of \$43,654.89 was net cash in the hands of the executor. By said will the defendant was bequeathed an undivided one-half of the estate, while to her daughter, Mildred Jane Porter, the deceased left a legacy of twenty-five thousand dollars in money. There were also certain other minor legacies aggregating the sum of five thousand dollars. This will was duly offered and admitted to probate, and the defendant was appointed executor without bonds. The first annual account of the executor was filed in September, 1913, and showed the above net cash balance in his hands after all claims had been presented and paid. On April 13, 1914, a petition for partial distribution was filed. It purported to be signed by Mildred Jane Porter, but it is conceded that her signature to said petition was written by the local attorney who assumed to act for her in preparing and presenting the petition. At the time this petition was filed Mildred Jane Porter was in the state of Wisconsin and was a minor just under the age of eighteen years. Notice of hearing thereon was served upon the attorney of record of the defendant, and shortly thereafter a resistance to the petition signed by the defendant was presented and filed. A hearing was had on June 12, 1914, and thereupon the court made an order or decree of partial distribution, by the terms of which the defendant was directed to pay to Mildred Jane Porter, on or about the sixteenth day of June, 1914, the sum of twenty-five thousand dollars, the full amount of her legacy. On June 19, 1914, the defendant having failed and refused to comply with this order, an attachment was issued for his person upon an order to show cause why he had failed to pay over said legacy, and on July 10, 1914, on the hearing thereon, the defendant was committed to the custody of the sheriff until he should obey the order of the court. He remained in the sheriff's custody until August 5, 1914, when the grand jury returned an indictment charging him with the embezzlement of the amount of this legacy. Upon trial the defendant was convicted and sentenced to seven years in the state prison. From the judgment of conviction and from an order denying a motion for a new trial the defendant prosecutes this appeal.

The first contention urged by the appellant is that the venue of the offense was not proved as laid in the indictment. This contention the appellant predicates upon certain premises, the first of which is his assertion that the time within which

his embezzlement of the money constituting this particular legacy could possibly have been committed is that lying between the twelfth day of June, 1914, the date of the decree of partial distribution, and the fifth day of August, 1914, the date of the indictment. During this period the evidence shows that the defendant was in Monterey County from June 10th to June 19th; and hence, appellant argues, could not have committed a crime triable in Marin County between those dates. From June 19th to August 5th the defendant was in the custody of the sheriff and in jail in Marin County, and could not, therefore, according to the argument of appellant, have committed the crime of embezzlement between those dates. Conceding for the sake of argument that the venue of the crime would have been properly laid in Monterey County had the defendant committed the offense while there, still we see no difficulty in the way of his having been able to accomplish the criminal conversion of this money during the time when he was in the custody of the sheriff in Marin County. He could easily have drawn a check or order on the actual custodian of the funds if they were then intact, and have thus diverted them to his own use.

The second premise of the appellant is equally untenable, wherein he argues that the earliest date at which he could have committed the offense was June 12, 1914, the date of the decree of partial distribution. It is appellant's contention that the title of Mildred Jane Porter to this legacy takes its inception in this decree; but this is not the law of this state. According to the terms of section 1341 of the Civil Code, "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." (*Estate of Campbell*, 149 Cal. 712, [87 Pac. 573]; *Estate of Glenn*, 153 Cal. 77, [94 Pac. 230].) In the light of this section of the code and of these authorities it seems clear that Mildred Jane Porter was the owner of this legacy from the date of her mother's death, subject to the claims of the creditors of the estate and to the rights of other devisees and legatees to a ratable distribution in case the estate prove insufficient to fully satisfy the terms of the will, neither of which conditions exists in this case. For purposes of administration the temporary possession of the entire estate, including the money which this legacy called for, was in the executor; and the condition of his trust was that it should

be safely kept until such time as it should be distributed to its owners by the court's decree. The fact that the defendant, as executor of this estate and custodian of these funds, was also the owner as devisee of an undivided one-half of the estate would in no sense have entitled him to convert any portion of this estate to his own personal uses prior to its legal distribution; and if he did so he would be guilty of embezzlement, although no decree of partial or final distribution had yet been made. This being so, the contention of the appellant as to the limited period to which the time of commission of the offense is to be confined must fail. The jury may have concluded from the evidence before it that the defendant had converted these funds to his own uses prior to the making of the decree of partial distribution, and we think there was enough evidence to justify such a conclusion. The fact that in one or more of his reports or accounts the executor reported this money as on hand in the estate would not be at all conclusive that the funds were actually there at the time of such report.

The appellant urged several objections to the admission in evidence of the decree of partial distribution, which objections he vigorously repeats in this court as grounds of reversible error. But the decree of partial distribution, as we have seen, was not the source of the legatee's title, but served only in this case as the basis for the demand made on behalf of the complaining witness, refusal of which would in itself amount to an act of conversion. This view of its value as evidence in the case removes much of the force of appellant's objections to the decree of partial distribution based upon the claim that it had not become final through the expiration of the period within which it might have been appealed from at the time of its offer and admission in evidence. As to this proposition, it was not necessary that it should have become final in order to serve as a basis for the legatee's demand for the delivery to her of the legacy which it directed. The statute (Code Civ. Proc., sec. 1661) provides that the court may make its order "requiring the executor to deliver to the legatee the whole portion of the estate to which he may be entitled." It follows necessarily that the court could in such order require such delivery within a specified time, which might be much more brief than the time allowed for an appeal from such order; besides, this defendant as executor had no

right of appeal from this order. (*Estate of Williams*, 122 Cal. 76, [54 Pac. 386].) His only right of appeal was in his capacity as devisee, and in that capacity his rights were unaffected by this order. And since it did not determine the legatee's title to her legacy, but only her right to its present possession upon a fixed date, the defendant as the executor of the estate was bound to comply with it, or else, as a devisee injuriously affected thereby, to appeal from it within the time required for compliance with its terms, just as in the case of any other judgment or order requiring the present payment of money, from which a party has the right of appeal within a certain period. If he would stay the execution or effect of the judgment or order, he must exercise his right of appeal from it at once, or else he must obey its mandate. In this case the defendant neither obeyed the court's order in his capacity as executor nor appealed from it in his capacity as a devisee, and hence it was properly admitted in evidence as the basis of the legatee's demand for the delivery of her legacy to her, the refusal of which would be evidence of a conversion.

The appellant's further contention that the trial court erred in admitting this decree in evidence, for the reason that the probate court did not acquire jurisdiction to make it, is based upon the facts that the petition for partial distribution had appended to it the name of Mildred Jane Porter, which was written there not by herself but by her local attorney, while Mildred Jane Porter was, at the date of filing said petition, a minor just under the age of eighteen years, and was not competent to give a delegation of authority. But the record affirmatively shows that shortly after the filing of this petition Mildred Jane Porter became of age, and coming to California, and being then of age, participated in the proceedings for partial distribution, and thereby ratified the acts of the attorney who represented her in filing and presenting her petition. The record also discloses that the defendant appeared in response to whatever notice was given, and filed his formal resistance to the petition without objection to it upon the grounds now urged; and it further appears that upon the day set for hearing the attorney of record for defendant, as executor of the estate, appeared and consented in open court to the entry of the decree. These acts on the part of the defendant constituted a waiver of whatever informalities

there may have been in the presentation of the petition or in the form of notice of the hearing thereon. (*Crew v. Pratt*, 119 Cal. 131, [51 Pac. 44].)

The appellant urges a number of objections to the instructions given or refused or modified by the court; but a reading of the entire body of the instructions as given by the court convinces us that these objections are not substantial enough to justify a reversal or merit a separate review.

Judgment and order affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 24, 1916.

[Civ. No. 1410. Third Appellate District.—December 27, 1915.]

HENRIETTE SCHEELINE et al. (a Copartnership), Respondents, v. S. A. PEZZOLA et al., Appellants.

SALE OF INTOXICATING LIQUORS—RECOVERY OF PRICE—CONSPIRACY TO OBTAIN LICENSE—VOID CONTRACT.—A wholesale liquor firm engaged in the business of selling intoxicating liquors which participates in a conspiracy to circumvent the provision of a county ordinance which prohibits any person engaging in the saloon business in the county who was not a citizen of the United States, cannot legally enforce the payment of sales of liquors made by it to the persons to whom a license for the conducting of such business was thus illegally issued.

ID.—CONTRACTS—LAWFUL PURPOSE ESSENTIAL.—A contract must have a lawful purpose, and transactions in violation of law cannot be made the foundation of a valid contract.

ID.—ILLEGAL SALE OF LIQUORS—VOID CONTRACT.—Where the illegal sale of liquor enters into any contract as an inseparable part of its consideration, or the terms or conditions of the contract are inseparably connected with the illicit traffic in liquors, it is against public policy and immoral, and therefore void.

APPEAL from a judgment of the Superior Court of Plumas County. J. O. Moncur, Judge.

The facts are stated in the opinion of the court.

L. N. Peter, for Appellants.

H. B. Wolfe, for Respondents.

BURNETT, J.—The appeal is from a judgment for \$1,023.25 and costs.

The following statement made by appellants is not disputed and seems to be substantially accurate: Respondents are a wholesale liquor firm engaged in the business of selling intoxicating liquors; they made certain sales of such liquors to appellants to be used by the latter in conducting a saloon in Plumas County. When the orders were placed with respondents for the delivery of the liquors, there was an ordinance in said county prohibiting any person from engaging in the saloon business without a license, and no person could obtain a license who was not a citizen of the United States. Appellant A. Pezzola was not such citizen. The facts were known to respondents. Respondent Edwin S. Scheeline had an understanding with appellant S. A. Pezzola, whereby the latter was to make application to the board of supervisors of said county for a liquor license in his own name and conduct the business for appellant A. Pezzola, and it was understood that in case said license was issued the liquor was to be supplied to A. Pezzola or to both appellants. S. A. Pezzola made the application, the license was issued to him, and thereafter respondents furnished liquors, charging the sales on their books to both of the appellants, but all bills were made out against S. A. Pezzola. Said Edwin S. Scheeline testified that he understood "at the time that A. Pezzola, Steve Pezzola's father, was not a citizen of the United States and not entitled to engage in the liquor business under the ordinance of Plumas County, that S. A. Pezzola was running the business for his parents in his own name, they were unable to get a license."

Appellants contended that it thus appeared that there was a conspiracy, participated in by respondents, to violate or circumvent the law, and therefore that respondents were wrongdoers and would not be aided in a court of justice to reap any advantage from their unlawful contract, and appellants sought still further to develop the situation, as is shown

by the following quotation from the transcript: "Q. You understood it was in violation of the liquor ordinance of this county at that time? Mr. Wolfe: Objected to as irrelevant, immaterial, and incompetent. The Court: Sustained. Mr. Peter: Will your Honor hear me on that? The Court: I can't see how it is material. Mr. Peter: I want to develop that there was a conspiracy here to violate the law and this plaintiff was a party to it, and they cannot take advantage of their own wrong and the court will leave them where they left themselves. The Court: I don't think there is anything in that; I will hear the evidence." His answer was: "All I understood that they were violating the order was the fact if A. Pezzola should have the license, he couldn't have a license; they got the license for him." Afterward the court sustained an objection to this question: "You understood that under the law, under the liquor ordinance of this county and laws of the state you had no right, no one had a right to engage in the liquor business without a license, did you?" Counsel for appellants then stated that he offered to prove by the witness "that at the time he made the first sale testified to by him that he knew and understood that all the business, that the business, which was thereafter to be conducted in the name of S. A. Pezzola was for himself and A. Pezzola; that A. Pezzola was not permitted to engage in the business, to hold a license under the liquor ordinance of Plumas County, because he was not a citizen of the United States . . . and that he knew the fact of A. Pezzola engaging in the business was a violation of the ordinance." The court, however, held it to be immaterial. In this we feel satisfied the court was in error.

The law is well settled as to matters of this character and is aptly set forth in many quotations made by appellants from various authorities. The Penal Code of this state, in section 435, provides that "Every person who commences or carries on any business, trade, profession or calling for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor," and that any contract having for its object the violation of the law is against public policy is expressly provided in section 1668 of the Civil Code.

The decisions are collated in 6 R. C. L., page 692, et seq., and we may content ourselves with quoting section 98 as fol-

lows: "At no time in the history of the common law were contracts in violation of law regarded as valid. Individuals were never allowed to stipulate for iniquity. A contract, though it may be based on consent, derives its obligatory force from the sanction of the law. It would therefore be anomalous indeed if the law were to sanction contracts which violate the law. The law, which prohibits the end, will not lend its aid in promoting the means designed to carry it into effect. It will not promote in one form that which it declares wrong in another. The whole doctrine relating to illegal contracts is founded on a regard for the public welfare. In fact, it has been asserted that the maintenance of this doctrine is essential to the preservation of the state. It may therefore be said to be a fundamental principle of the law of contracts that a contract must have a lawful purpose and that transactions in violation of law cannot be made the foundation of a valid contract."

As to the particular fraudulent contract before us it is sufficient to quote from Cyc. as follows: "Where a license or certificate is required by statute as a requisite to one practicing a particular profession, an agreement of a professional character without such license or certificate is illegal and void. . . . The same is held where a license is required for the carrying on of a particular trade or business, as in the case of a wholesale or retail liquor dealer. . . . In such instances agreements made without the requisite license are generally held to be void." (9 Cyc. 478.)

"Where the illegal sale of liquor enters into any contract as an inseparable part of its consideration, or the terms or conditions of the contract are inseparably connected with the illicit traffic in liquors, it is against public policy and immoral and therefore void." (23 Cyc. 334.)

The showing made was sufficient to bring the case within the purview of the foregoing principle. It appears with reasonable certainty that plaintiff conspired with defendant S. A. Pezzola to circumvent the said ordinance, and, therefore, the law will not aid in the collection of the claim. Besides, appellants sought unavailingly to make more apparent the invalidity of the contract.

The judgment is therefore reversed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 323. Third Appellate District.—December 28, 1915.]

THE PEOPLE, Respondent, v. LIM FOON, Appellant.

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.—An instruction that "there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence," and that "a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts, if true, the fact on which the guilt or innocence depends must follow," while lacking in clearness of expression and not strictly grammatical, is not misleading.

ID.—DYING DECLARATION—DISREGARD BY JURY—INSTRUCTION PROPERLY REFUSED.—An instruction in which it was declared that dying declarations should be received with caution, and that unless it appeared that the declaration made by the deceased just prior to his death accusing the defendant of having fired the fatal shots was made "under a clear opinion of impending death, you cannot consider such declaration as evidence in this case, and the court cautions you . . . not to give as much weight to such evidence as if the same statement had been testified to in health and subject to cross-examination," is properly refused, where the jury was instructed to receive with caution the evidence of the dying declaration "for the reason that the declarant had not been administered an oath, and an opportunity for cross-examination has not been afforded the defendant and that the declarant might be influenced against the defendant," and for the further reason that the physical condition of the deceased when making the statement might have been such as to render questionable the reliability of his declaration.

ID.—IDENTITY OF MURDERER—CONFLICT OF PROOF—DUTY TO ACQUIT DEFENDANT—INSTRUCTION PROPERLY REFUSED.—An instruction in a prosecution for murder that if the jury believed from the evidence that the person who fired the fatal shots was a man taller and heavier than the defendant, it was their duty to acquit the defendant, "notwithstanding that certain witness or witnesses may testify that the person who fired such shots was said defendant, nevertheless, there would exist such a conflict as to the identity of the person who fired such shots as to raise a reasonable doubt as to whether or not it was the defendant," is properly refused.

ID.—ACQUITTAL OF DEFENDANT—REASONABLE DOUBT OF GUILT BY SINGLE JUROR—INSTRUCTION PROPERLY REFUSED.—An instruction advising the jury that if after considering all the evidence "a single juror has a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, then they cannot convict him," is properly disallowed, where the court instructed all the jurors that if they entertained a reasonable doubt of the defendant's guilt or "upon a single fact or element necessary to constitute the crime, it is your

duty to give the defendant the benefit of such doubt and acquit him."

ID.—CREDIBILITY OF DYING DECLARATION—BELIEF IN HEREAFTER—INSTRUCTION PROPERLY REFUSED.—An instruction that if the jury believed that the deceased "had no fear of God" and "had no conception of life after death wherein he would receive punishment for failure to tell the truth," then his alleged dying declaration should be disregarded "for the reason that there was no compelling cause to tell the truth in the hour of his impending death," is properly refused, in the absence of any evidence addressed to such matter other than the implication that the defendant might have been an adherent of a heathenish religion from the fact that he was a Chinaman.

ID.—MAKING OF DYING DECLARATION—DESIRE TO WREAK VENGEANCE—INSTRUCTION PROPERLY REFUSED.—An instruction that if the jury found that the deceased was actuated in making his alleged dying declaration "by the desire to wreak vengeance upon some person whom he might believe was a member of a society or a relative of a member of such society which was an enemy of a society to which the deceased belonged," it would then be their duty wholly to disregard such declaration, is properly refused, in the absence of any evidence justifying such implication.

ID.—DYING DECLARATION—EVIDENCE.—A dying declaration is admissible when it is made to appear that the declaration was made by a dying person under a sense of impending death, and that such declaration related to the cause of his death.

ID.—EVIDENCE—FLIGHT OF DEFENDANT—CROSS-EXAMINATION OF WITNESS—LIMITATION NOT ERRONEOUS.—Where a witness to the homicide is subjected to an extended cross-examination as to the direction in which the defendant ran immediately following the shooting, it is not prejudicial error to restrict the further examination of the witness as to how near he was to the defendant when the latter passed him.

ID.—EXAMINATION OF WITNESSES—DUTY OF COURT.—Where it is evident to the trial court, after a full and exhaustive examination of a witness upon a subject concerning which particular information is desired, that nothing more can be accomplished by continuing the inquiry, it is the duty of the court to put an end to such examination.

ID.—NEW TRIAL—IMPEACHING EVIDENCE.—It is not an abuse of discretion to refuse a new trial in such a prosecution upon the ground of newly discovered evidence, where it is apparent from the affidavits in support of the motion that the only purpose which the evidence referred to therein could accomplish would be the impeachment of two witnesses who testified for the prosecution and whose testi-

mony was itself wholly in impeachment of the testimony of the defendant and his witnesses upon the question of the *alibi* sought to be shown by the accused.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. J. A. Plummer, Judge.

The facts are stated in the opinion of the court.

Stephen N. Blewett, and George F. McNoble, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was convicted in the superior court of San Joaquin County of the crime of murder of the first degree, the jury fixing the penalty at imprisonment for life. (Pen. Code, sec. 190.)

This appeal is prosecuted by the defendant from the judgment and the order denying him a new trial.

The homicide occurred in the Chinese quarters of the city of Stockton, on the seventh day of March, 1915, and the party killed was an aged Chinese by the name of Yip Suey.

There is testimony showing that the shooting resulting in the killing of Yip Suey took place a short time after the noon hour of the day mentioned; that it was witnessed by several white men and a number of Chinese; that two Chinamen, the defendant and another, the latter not having been captured, simultaneously shot into the body of the deceased, one of the Chinamen so shooting being approximately on the right and the other likewise on the left side of their victim; that, after the shooting, both the Chinese engaged in the shooting ran from the scene thereof, the defendant going in a southerly direction and throwing the pistol with which he did the shooting on the sidewalk or street as he ran, and the other going rapidly in the opposite direction; that the defendant was pursued and ran into a building into which he was followed by some citizens and was finally apprehended near a chicken-house in the rear of the building into which he fled and which was occupied by Chinese; that, when arrested, he was freely perspiring and bore the appearance of being nervous; that, shortly thereafter, the assistant district attorney brought the

defendant into the presence of Yip Suey and asked the latter if he knew the Chinaman so brought before him and Yip Suey, who had previously stated that he expected to die from his wounds, declared, pointing at said Chinaman, "Yes, him man shoot me"; that Yip Suey shortly thereafter expired from the effects of his wounds; that an autoptical examination disclosed that into his body six shots had been fired, and that at least two of the wounds so produced were necessarily mortal.

The defendant at the trial claimed that he had nothing to do with the shooting, was not present at the scene of the homicide when it occurred, and, therefore, sought to establish an *alibi*.

It is not claimed on these appeals that the verdict is not sufficiently supported by the evidence, but it is contended that alleged errors in the rulings upon the evidence and in the action of the court in giving and in refusing to give certain instructions so seriously militated against the substantial rights of the accused at the trial as to compel a reversal of the judgment and the order. It is further insisted that the court should have granted a new trial on the ground of newly discovered evidence, and that its refusal so to consider and determine the effect of the showing made in that particular constituted an abuse of its discretion and, therefore, prejudicial error.

The assignments involving attacks upon the action of the court with respect to certain instructions are numerous, and some of them merit and will receive special notice.

1. The first point under this head is directed against an instruction in which the trial court described to the jury the two classes of evidence—direct and circumstantial—which are permissible in courts of justice for the proof of a disputed fact, and upon either of which, in a criminal case, a verdict of conviction may be predicated, if it measures up to the requirement of the rule in that class of cases that guilt must be established to a moral certainty and beyond a reasonable doubt. The particular part of said instruction to which the strictures of the defendant are confined is as follows: "There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence; a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts, if true, the fact on

which the guilt or innocence depends must follow." In the same instruction, the court explained to the jury with clearness that in any case, whether the proof relied upon to establish guilt was direct or merely circumstantial, a conviction could not be justified unless such proof was such as to establish the fact of guilt beyond a reasonable doubt.

Instructions explaining to juries in criminal cases the distinction between direct and circumstantial evidence have often been given in substantially the same language as the one challenged here and have as often been approved by reviewing courts. (*People v. Morrow*, 60 Cal. 142, 144; *People v. Wilder*, 134 Cal. 182, 184, [66 Pac. 228]; *People v. Simmons*, 7 Cal. App. 559, 565, 566, [95 Pac. 48].) And such an instruction may with propriety be given in all appropriate cases, for there is a distinction between those two classes of evidence—an inherent distinction which is expressly recognized and explained by our laws (secs. 1828, 1831, and 1832, Code Civ. Proc.)—which should be explained to juries with the further explanation that the degree of proof essential to a conviction is in no sense or measure influenced by such distinction. The common notion with respect to the proofs in criminal cases is that a *stronger* case should be made before a conviction is justified where, for a conviction, sole reliance is placed upon evidence of purely a circumstantial character. This is, of course, an erroneous notion, the true rule being that the degree of proof necessary to a conviction is precisely the same whether the proof relied upon for a conviction be direct or circumstantial. In other words, whatever may be the character of the evidence, whether it be the direct testimony of an eye-witness to the fact in dispute or evidence of circumstances from which the existence of the fact in dispute may be inferred, it being relevant and competent, a conviction will be justified and sustained if the guilt of the accused is shown to a moral certainty and beyond a reasonable doubt, and, as stated, it is with eminent propriety that the jury should be enlightened upon these important matters.

While the language above quoted from the instruction in question here, as it appears in the record, is lacking in that clearness of expression which should always characterize instructions to juries, and, indeed, is not strictly grammatical, because of the omission to have inserted in the part quoted

above the words, "from which," immediately following the phrase, "as to a number of facts," still, taken as a whole, the instruction appears to be sufficiently clear in the expression of its true meaning as not to have had the effect of misleading the jury with respect to the proposition which it was the purpose and intention to explain by it.

2. The following instruction was proposed by the defendant, but disallowed by the court: ". . . If you believe from the evidence in this case that the person who fired the shots which caused the death of Yip Suey was a man taller and heavier than this defendant, notwithstanding that certain witness or witnesses may testify that the person who fired such shots was said defendant, nevertheless, there would exist such a conflict as to the identity of the person who fired such shots as to raise a reasonable doubt as to whether or not it was the defendant, then it is your duty to acquit this defendant."

The instruction was properly refused. Paraphrased, and thus reduced to its actual meaning, it merely states to the jury the very obvious proposition that if they should believe from the evidence that some other person than the defendant shot and killed Yip Suey, the accused would be entitled to an acquittal, and, of course, in that case he would be, and his acquittal obviously the result of a total failure to establish guilt beyond a reasonable doubt or at all and necessarily the complete repudiation of contrary proof, and not upon the proposition that a reasonable doubt existed by reason of a conflict between the evidence convincing them that some other person did the shooting and the testimony involving an expression of the opinion of certain witnesses that the defendant was the guilty party. Perhaps, however, the real purpose of the instruction was to state that a conflict as to the defendant's guilt arose in the evidence by reason of the positive statements of certain witnesses that a man not fitting his description did the shooting, and testimony showing the expression of the belief by other witnesses who claimed to have seen the trouble that the defendant was one of the men who shot the deceased, and that the conflict so arising in the proofs was sufficient to create a reasonable doubt of the defendant's guilt. But, assuming that to have been the proposition so sought to be stated, the instruction would still be vulnerable and wholly improper, since clearly it would involve a

trespass upon the province of the jury, with whom alone rests the right or the power to determine for themselves whether there exists under the evidence reasonable doubt of the defendant's guilt.

3. The instruction requested by the defendant but rejected by the court, upon the question of the *alibi* interposed by the defendant, was fully covered by an instruction which constituted a part of the court's general charge. Instructions upon particular propositions are not required to be repeated, and for this reason the court was justified in disallowing the instruction in question.

4. The defendant proposed an instruction which would have told the jury that if, after considering all the evidence, "a single juror has a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, then they cannot convict him." The court rejected said instruction, and it is here claimed that it was prejudicial error to do so. The court properly disallowed the instruction upon the ground, as assigned by it, that the proposition therein stated was covered by the charge. The charge was, of course, addressed to all the jurors, and therein it was declared that if the jury entertained a reasonable doubt of the defendant's guilt or "upon a single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit him." We must assume that from that language the jury must have understood that if, after a consideration of the evidence, any one of them entertained a reasonable doubt of the defendant's guilt or upon any element or fact the proof of which was essential to a conviction, it would be his duty not to agree to a verdict of guilty, and to adhere to his conviction so long as he remained in that state of mind. We are not authorized to assume that a juror who entertains a reasonable doubt of the guilt of a person charged with a criminal offense will yield his views merely because a majority of the jurors or all but himself have agreed upon the guilt of the accused. Such an assumption would involve an imputation against the intelligence of the average person competent under the law to serve in that important capacity which is not warranted, and such would necessarily be the assumption if we were required to hold that the jurors in this case did not understand from the court's general charge that a concurrence of all was requisite

to reach a verdict, and that none was required or, indeed, justified, in concurring in a verdict of guilty if he entertained a reasonable doubt of the defendant's guilt under the evidence.

5. The defendant requested the court to submit to the jury an instruction in which it was declared that dying declarations should be received with caution, and that, unless it appeared that the declaration made by the deceased just prior to his death accusing the defendant of having fired the fatal shots, and which declaration was admitted in evidence, was made "under a clear opinion of impending death, you cannot consider such declaration as evidence in this case; and the court cautions you . . . not to give as much weight to such evidence as if the same statement had been testified to in health and subject to cross-examination." The instruction further stated that if the jury believed that the deceased "had no fear of God" and "had no conception of life after death wherein he would receive punishment for failure to tell the truth," then his alleged dying declaration should be disregarded, "for the reason that there was no compelling cause to tell the truth in the hour of his impending death." The court refused to adopt the instruction on the ground that there was "no evidence upon which to base part of the instruction—proper portion covered by instruction elsewhere given."

Another of the instructions proposed by the defendant bearing upon the dying declaration stated that, if the jury found that Yip Suey was actuated, in making said declaration, "by the desire to wreak vengeance upon some person whom he might believe was a member of a society or a relative of a member of such society which was an enemy of a society to which said Yip Suey belonged . . .," it would then be their duty wholly to disregard and place no reliance upon such declaration. The court disallowed said instruction on the ground that there was no evidence to which it was pertinent.

The court committed no error by thus disposing of the proposed instructions. An instruction was embodied in the court's charge which admonished the jury to receive with caution the evidence of the dying declaration, "for the reason that the declarant had not been administered an oath, and an opportunity for cross-examination has not been afforded

the defendant, and that the declarant might be influenced against the defendant," and for the further reason that the physical condition of the deceased, when making the statement, might have been such as to render questionable the reliability of his declaration.

The instruction given, as will be observed, fully covered the portion of the rejected instruction cautioning the jury, for reasons therein stated, to scrutinize the dying declaration with more than the usual care with which ordinary testimony is received and considered. There was no testimony justifying the implication contained in the rejected instruction that the deceased, in accusing the defendant of having fired the shots into his body, was actuated by "the desire to wreak vengeance upon some person whom he might believe was a member of a society or a relative of a member of such society which was an enemy of the society or tong to which said Yip Suey belonged." Nor was there any testimony from which it may be determined what the declarant's belief was as to a "hereafter," or whether he believed or did not believe that he would, were he to falsely accuse another, subject his soul to punishment after his immortal self had been separated from the flesh. And our law does not require that such fact should be shown to render the declarant's statement admissible. If it is made to appear, as it was made to appear here, that the declaration was made by a dying person under a sense of impending death, and that such declaration related to the cause of his death, then it is sufficient. (Code Civ. Proc., sec. 1870, subd. 4.) Undoubtedly, if it were made to appear that the declarant was wholly obtuse to religious convictions and that he entertained complete disbelief in a future spiritual existence or had no regard whatsoever for the theory of rewards and punishments in the hereafter, his statement *in extremis* would not be supported by those considerations which may naturally be supposed to exercise an overruling influence upon the minds of men in such circumstances, and in such case, even if, nevertheless, the competency of the declaration as evidence would not be destroyed, the credibility of it would be greatly impaired, and when given under such circumstances it should never be submitted to a jury unaccompanied by an explicit admonition by the court that it should be viewed with great caution. In this case, however, no less than in any other, it is

not to be presumed, merely because the declarant might have been an adherent of a heathenish religion—a fact which may reasonably be implied from the race to which he belonged—that he did not as religiously believe in “future rewards and punishments” as those who believe in the Christian religion, and that a statement made by him in the face of impending death would not be attended by the same degree of solemnity or given under the same conception of consequences as that under which a statement under like circumstances would be made by one charged with religious convictions of a more rational and civilized order. In any event, as stated, the court sufficiently enlightened the jury with respect to their duty in considering the dying declaration admitted in evidence, and for the reasons assigned by the court the instructions proposed by the defendant upon that subject were properly rejected.

The refusal to allow some other instructions proposed by the defendant is criticised, but said instructions involved, substantially, a repetition of the statement of principles contained in the rejected instructions which we have above noticed, and it is, therefore, unnecessary to give them special attention herein. In concluding on this branch of the case, we may observe that the court’s charge to the jury, as a whole, covered every pertinent point or issue developed in the case correctly and in clear language, and that in this regard, as in all others, the court’s conduct of the trial was notably characterized by fairness and impartiality.

6. The witness Corbett, testifying for the people, said that he was near the scene of the shooting when it occurred, and that the defendant, in fleeing therefrom after the firing had ceased, ran north on Hunter Street and entered a house north of the house in which the defendant was found. On cross-examination, after subjecting the witness to extended questioning as to the direction in which the defendant fled from the scene of the shooting, he was asked: “Well, about how many feet were you from him [defendant] when he was running toward you, when you got over here?” The court thereupon interrupted, addressing the attorney: “Mr. Blewett, you have gone over that now several times.” Mr. Blewett retorted: “Well, this is very important.” The Court: “I know, but you can’t go over it and over it, repeat every question. You had him say he was about five feet from the

mouth line. Go on to a different examination. The court will not permit you to take the time to go over and over it; I want to give you a full opportunity for cross-examination, but not by going over and over."

It is now claimed that the action of the court in thus limiting the defendant's right to fully cross-examine the witness upon the lines then being pursued constituted prejudicial error, particularly in view of the fact that the testimony of said witness was of singularly vital importance, he having testified that he witnessed the tragedy and identified the defendant as one of the assailants. It is argued that, if permitted to proceed with his cross-examination upon the lines upon which he was questioning the witness when interrupted by the court and further cross-examination upon those lines curtailed, the attorney for the accused would have probably succeeded in making the witness definitely and unqualifiedly say that the defendant, upon the cessation of the shooting, ran in a *northerly* direction from the scene thereof, and that thus the verity of his statement that he witnessed the shooting would have been greatly impaired, if, indeed, his testimony in that regard not altogether impeached, inasmuch as the defendant was found, shortly after the shooting, in the rear of a building *south* of the point where the shooting took place.

As has been shown, the question asked by the attorney when the court made the order or ruling complained of was: "Well, about how many feet were you from him when he was running toward you, when you got over here?" Precisely the same question had several times been previously propounded to the witness by the defendant's attorney and as many times answered. At page 226 of the transcript, on cross-examination, it will be found that Corbett stated that the defendant, in his flight, had passed "close" by where the witness was standing; at page 228, it will be seen that the witness, on cross-examination, testified that the defendant passed him or where he was standing at a distance of about five feet; at page 229, it will be observed that the same question was put to the witness and that he replied that the accused passed him at about a distance of five feet from where he (witness) was standing. At page 231 of the transcript will be found the question which is responsible for the present discussion.

Even if it might justly be said that the allowance of further questioning of the witness as to the matter to which the question was addressed would have ultimately led, as counsel contend would have been the inevitable result thereof, to a positive statement of the witness that the defendant ran from the place where the shooting occurred in a *northerly* course, and thus the force of the witness' testimony that he saw the shooting destroyed, an answer to the objection is that the witness, as seen, *did* testify that the defendant ran in a *northerly* direction from the point at which the shooting was done, and, although his testimony thereafter appears to be somewhat confusing or hazy upon that point, the fact was, nevertheless, sufficiently brought out to be available to the defense for any purpose to which it might be advantageously put in argument to the jury. But it is manifest that the court's order curtailing further cross-examination did not, nor was it intended to, have the effect of putting an end to the questioning of the witness further as to the direction in which the defendant ran from the scene of the homicide, but that the sole purpose of the order was merely to foreclose further inquiry as to the question of how near the defendant went to the point where the witness stood as he (the defendant) in his flight passed the former. And, very clearly, the witness had been sufficiently questioned as to that fact, and the court as clearly remained within the bounds of a sound judicial discretion in stopping further cross-examination upon that point. As was said in *Phenagar v. Paolini*, 27 Cal. App. 381, 391, [149 Pac. 1008, 1012]: "There must be a limit somewhere to the examination of a witness upon a particular subject, and where, as seems to have been true here, it is evident to the trial court, after a full and exhaustive examination of the witness upon the subject concerning which particular information is desired or desirable, that nothing more can be accomplished by continuing the inquiry than has already been accomplished, then it is clearly within the discretion, and, indeed, the duty, of the court to put an end to the further prosecution of the examination." (See, also, *Reed v. Clark*, 47 Cal. 194, 201; *People v. Mooney*, 132 Cal. 13, 17, [63 Pac. 1070]; *People v. Harlan*, 133 Cal. 16, 22, [65 Pac. 9]; *People v. Rader*, 136 Cal. 253, 254, [68 Pac. 707].)

7. One of the grounds upon which the defendant pressed his motion for a new trial was that of newly discovered evi-

dence, and in support of the motion upon that ground a number of affidavits were filed and presented to the trial court.

The defendant, in support of his *alibi*, attempted to show that, at the time of the shooting, he was in the store of the Quong On Chung Company, at 138 Washington Street, and he testified that he was at said store and therein was corroborated by a number of other witnesses, among whom was one Lem Yeong. In rebuttal, the people called to the stand two Chinese, Hong Lun and Lee Loy, who claimed to have been in the store of the Quong On Chung Company at the time of the shooting, and who testified that neither the defendant nor his witness, Lem Yeong, was in said store at said time. Four of the affidavits filed by the defendant in support of his motion for a new trial on the ground mentioned were made by as many different Chinese, who therein deposed that, when the shooting occurred, Hong Lun was not a farmer, as he had testified, but was a gambler, and that when the shooting occurred he was in a gambling-house at 131-133 East Washington Street, which is located at some distance from the store above named. Two of the affidavits so filed were by two Chinese who therein declared that they were in a rooming-house above the store of the Quong On Chung Company, that they heard the shooting and that at that time Lee Loy was with them in a room in said rooming-house. Two other Chinese made affidavits, which were among those filed, in which they deposed that they saw Lee Loy, immediately after the shooting, come out of the rooming-house above mentioned. Mr. Blewett, attorney for the defendant, made and filed an affidavit in which, after showing the relevancy and alleging the importance of the testimony of the several Chinese affiants, he declared that he had no knowledge of the existence of the evidence to which the affidavits related at the time of the trial, and that he "could not by the use of reasonable diligence have discovered and produced the same upon the former trial."

It is plainly manifest that the effect of the evidence claimed to be "newly discovered" and referred to in the affidavits would merely be to impeach the statements of Hong Lun and Lee Loy that the defendant was not in the Quong On Chung Company store when Yip Suey was shot.

"A motion for a new trial upon the ground of newly discovered evidence has always been regarded by the courts with



a great deal of suspicion and disfavor. It has been said that 'the temptations are so strong to make a favorable showing after a defeat in an angry and bitter controversy, and the circumstance that the testimony had just been discovered when it is too late to introduce it, is so suspicious that courts require the very strictest showing of diligence.' " (*People v. Freeman*, 92 Cal. 359, 366, 367, [28 Pac. 261]; *People v. Sutton*, 73 Cal. 243, [15 Pac. 86]. Hence, it has always been held that whether a motion for a new trial should or should not be granted upon the ground of newly discovered evidence is a proposition which is addressed to the sound discretion of the trial court, and that the denial of a new trial on that ground will not be reversed unless it clearly appears that the court abused its discretion by its action in that regard. (*People v. Loui Tung*, 90 Cal. 377, [27 Pac. 295]; *People v. Tallmadge*, 114 Cal. 427, 430, [46 Pac. 282].) And, furthermore, where the only office of newly discovered evidence is to impeach adverse witnesses, it is insufficient as a basis for granting a new trial. (*People v. Loui Tung*, 90 Cal. 377, [27 Pac. 295]; *People v. Goldenson*, 76 Cal. 328, 352, [19 Pac. 161]; *Stoakes v. Monroe*, 36 Cal. 388; *People v. Anthony*, 56 Cal. 399.) As before stated, and as is plainly apparent from the affidavits themselves, the only purpose which the evidence therein referred to could accomplish, if anything at all, would be the impeachment of two witnesses who testified for the prosecution and whose testimony was itself wholly in impeachment of the testimony of the defendant and his witnesses upon the question of the *alibi* sought to be shown by the accused.

We conclude that there was no error or abuse of discretion in the action of the court refusing to grant the defendant a new trial upon the ground of newly discovered evidence.

No substantial error appearing in the record, the judgment and the order appealed from must be affirmed, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred,

[Civ. No. 1830. Second Appellate District.—December 29, 1915.]

J. H. THORNBUR, Respondent, v. **J. O. HART**, Appellant.

ELECTION CONTEST—DELAY IN OPENING POLLS—ABSENCE OF FRAUD—PRECINCT VOTE NOT INVALIDATED.—In an election contest it is error to reject the entire vote of a precinct because of a delay of one hour and fifteen minutes in the opening of the polls, where such delay was not due to any fraudulent intent or design on the part of the election officers, but solely to the loss of the key to the polling place and the consequent inability to gain earlier access thereto.

ID.—OPENING OF POLLS—DELAY CONSISTENT WITH HONESTY—BURDEN OF PROOF.—It must be from the nature and necessity of the case that the legislature intended that some margin, even though narrow, should be allowed for honest effort to comply with the statute, and did not intend that the vote of any precinct should be invalidated because the polls were not open at the very instant of sunrise; and any person seeking to take advantage of omission in such regard must allege some delay sufficient to show a transgression of the statute inconsistent with an honest and intelligent endeavor to obey its command, or that the violation of its letter on which he relies has operated to obstruct the full and fair expression of the suffrage of the precinct.

APPEAL from a judgment of the Superior Court of Kern County. **Milton T. Farmer**, Judge.

The facts are stated in the opinion of the court.

Borton & Theile, for Appellant.

E. L. Foster, and **Charles A. Barnhart**, for Respondent.

JAMES, J.—Appellant, at an election held in the county of Kern in 1914, was declared to have been elected to the office of supervisor. Thereafter respondent, who was the opposing candidate at that election, filed notice of contest and a recount of the votes of the supervisorial district was had in the superior court. Respondent was successful in that proceeding. The contestee has appealed from the judgment.

The main contention is that the evidence was insufficient to support the findings and judgment. By the notice of contest first filed the contestant set out various irregularities or acts of malconduct on the part of the board of election, as are

permitted under section 1111 of the Code of Civil Procedure, as grounds of contest, but did not specify in the original notice of contest particularly the ground afterward relied upon, that there had been a delay in the opening of the polls in precinct No. 20 of the supervisorial district. At a later date, and after the time had expired within which the proceeding of contest might be instituted, the contestant was allowed to amend his statement of contest by adding thereto an allegation as follows: "That in said precinct number 20, the said polling place as established by the Board of Supervisors, as aforesaid, was not opened at the time required by law, and a large number of voters were unable to vote, who had presented themselves at said polling place for the purpose of voting, prior to the opening of said polling place." The appellant objected to the making of this amendment, both on the ground that it was offered too late and also on the ground that it in its substance did not sufficiently set out a ground of contest. Both objections were by the court overruled. The trial judge concluded, as shown by the record, that inasmuch as malconduct of the officers of election in some particulars had been set out and alleged in the original statement of contest, adding to such allegation of malconduct statements of other acts committed by such officers would not in effect be the making of a statement of a new cause or ground of contest. While section 1117 of the Code of Civil Procedure, provides that no statement of the grounds of contest will be rejected for want of form, if the grounds are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested, it does seem clear that the contestee in such cases is entitled to have stated the particulars in which it is charged that malconduct was committed on the part of the officers conducting the election. In the statement of contest first filed it was not shown in any way that contestant would rely upon proof that there had been a delay in the opening of the polls in any precinct; while he assigned malconduct, he particularized in allegations pointing to certain specific acts and things. It is to indulge great liberality indeed toward the contestant to concede his right to file the amendment that was made. It is also exceedingly questionable whether the statement in the amendment was sufficient to show such a delay in the opening of the polls as would make a good

ground of contest, for the quantity of time embraced within that delay is not stated; it is only stated that the polls were not "opened at the time required by law." In the case of *Packwood v. Brownell*, 121 Cal. 478, [53 Pac. 1079], the specification of malconduct which our supreme court held to be insufficient was, "That the said board of judges of election of Pitt River precinct did not open the polls at sunrise of said day of election nor keep the polls open for the length of time required by law." In the case just cited the ruling of the trial court on a motion to dismiss the contest because of insufficiency of the specification was reviewed and the judgment reversed. However, it will not be necessary for us to announce a final conclusion on these two propositions, as we think that the main contention of appellant made as to a proposition which involves the crucial finding of the trial judge must be sustained. The court at the hearing of the contest canvassed the vote cast in all the precincts of the supervisorial district and rejected the entire vote of precinct No. 20, because there had been a delay of one hour and fifteen minutes in the opening of the polls. The result of the tally on the precincts, excluding precinct 20, gave to contestant a majority of 55 votes. Precinct No. 20 was a large precinct. There were residing in it at the time of the election 733 registered voters, and the election returns showed that 549 of these had voted at the election and that 239 had voted in favor of appellant and 163 in favor of contestant. So that, had the vote of precinct No. 20 not been rejected, the contestee would have had a majority of 11 votes over respondent. The court finds that the polls in precinct 20 were not opened until 7:15 A. M., and that there was not sufficient cause or excuse for the failure to open the polls; that between the hour of 6 A. M. and 7:15 A. M. at least fifty voters came to the polling place of precinct 20 and demanded the right to cast their ballots and offered to vote, and that "because of the polls not being open for the reception of ballots, a large number, to wit: more than 21, left the polls and were unable to vote, and it is not shown whether such voters did vote on said third day of November, 1914, or not." The court further expressly found that none of the acts or omissions of the election officers of precinct 20 were done or permitted with any fraudulent design on the part of said election officers, nor for the purpose of affecting the result of the election. The evi-

dence taken showed that the board of election officers arrived at the precinct in time to open the polls as required by law, but that the key to the building was missing. A search was instituted for the key and some outsider finally found it and the polls were thereupon immediately opened and votes received. So it appears that the delay in the opening of the polls which the court found to be without any fraudulent intent or intent to affect the result of the election, but still found to be inexcusable, was occasioned through the failure of the officers to make an entrance into the building or polling place. That the confusion in this regard was inexcusable we think can hardly be concluded from the evidence. As is said in *Packwood v. Brownell*, hereinbefore cited: "It must be from the nature and necessity of the case that the legislature intended that some margin, even though narrow, should be allowed for honest effort to comply with the statute, and did not intend that the vote of any precinct should be invalidated because the polls were not open at the very instant of sunrise. Therefore, further, if any person seeks to take advantage of omission in this regard, he must allege some delay sufficient to show a transgression of the statute inconsistent with an honest and intelligent endeavor to obey its command, or that the violation of its letter on which he relies has operated to obstruct the full and fair expression of the suffrage of the precinct." It will be remembered that for aught that the findings of the court show the 21 or more persons who left the polls of precinct 20 before 7:15 o'clock may have returned and voted during the many remaining hours of the election day. Therefore, if the burden was upon the contestant to show that he had been injured by reason of the alleged failure of the officers to have the polls open at 6 A. M., it is plain, according to the findings of the court, that he did not sustain this burden by proof. It is argued, however, that upon a showing being made of the delay in opening the polls, a presumption of damage arose which shifted the burden of proof to the contestee and required of him a showing that the irregularity did not result in damage to the contestant. This question and others incidental to the proposition were considered in the case of *Kenworthy v. Mast*, 141 Cal. 268, [74 Pac. 841]. In that case it was shown that there was a delay of from 6 to 7:45 o'clock in the opening of the polls of a certain precinct, a delay of thirty min-

utes more than the evidence and findings disclose here occurred in the case of precinct 20. The court there said that it had never been held in this state that a literal compliance with the provisions of the law as to the hour of opening the polls was absolutely essential to the validity of the vote of a precinct, and that the disobedience of even a mandatory statute must be liberally construed. The conclusion to be deducted from that opinion is that the supreme court did not consider a delay in opening the polls of one hour and forty-five minutes at the commencement of the day a great deviation from the requirement of the statute. The court there referred to the Packwood-Brownell case, *supra*, and called attention to the concurring opinion of the chief justice as filed in that case, wherein it was said that while the requirements as to time or place of holding an election are mandatory, the time in that connection meant the proper day for holding the election, and "that a slight delay in opening the polls, explained and excused by the absence of one of the officers, and by the necessity of setting up the booth, railings, etc., ought not to disfranchise the voters of a precinct, in the absence of any showing of actual injury." In the case last above cited there was even a greater delay in the opening of the polls than was shown in *Kenworthy v. Mast*, 141 Cal. 268, [74 Pac. 841], the delay being from 6:29 A. M. until 8:15 or 8:30, and we glean from the opinion that such a delay was not to be denominated great or considerable. In *Kenworthy v. Mast*, it is said: "The general rule, as stated in McCrary on Elections (section 165), is, that in the absence of a provision in the statute expressly declaring that a failure in this respect shall render the election void, it will be regarded as so far directory only, and that, unless the deviation from the legal hours has affected the result, it will be disregarded; but that if such deviation is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not." Considering the facts in evidence in this case and applying to them the law as we understand the supreme court to have declared it, we are not of the view that the delay shown in the opening of the polls in precinct 20 was either "great" or "considerable." Conceding correctness for that conclusion, it follows that the contestant failed to support his charges of malconduct with



proof of damage resulting therefrom to him. It would be most unjust, we think, to declare that all of the voters who cast their ballots at precinct 20 on election day should be disfranchised in their attempt to express a choice for supervisor simply because the election officers deviated from the strict requirement of the statute as to the opening of the polls. We, therefore, conclude that it was error for the court to have rejected the vote cast in that precinct. Had the findings of fact contained a particular statement showing the reason for the nonopening of the polls, a judgment might be directed without the necessity of further proceedings being had in the trial court. However, as the finding that the officers failed without sufficient cause or excuse to open the polls may import a finding of fraud, the review of the evidence which we have made becomes necessary in order to arrive at the decision indicated.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on January 28, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 24, 1916.

[Civ. No. 1934. Second Appellate District.—December 31, 1915.]

BAKERSFIELD & KERN ELECTRIC RAILWAY COMPANY (a Corporation), Petitioner, **v. GEORGE W. HAY et al.**, Respondents.

REFERENDUM PETITION — NUMBER OF SIGNATURES — CONSTRUCTION OF CHARTER OF BAKERSFIELD.—Under the charter of the city of Bakersfield approved by the legislature of 1915 (Stats. 1915, p. 1552), the words "general election" contained in section 32 of such charter, relating to referendum elections, and therein requiring that a petition protesting against the passage of an ordinance must be "signed by electors of the city, equal in number to twenty-five per centum or more, of the entire vote cast at the last general election," when read with other sections of such charter relating to such



elections, have reference to the last general municipal election, and not to the last general state election.

ID.—SUFFICIENCY OF PETITION—LAST MUNICIPAL ELECTION PRIOR TO CHARTER—WHEN CONTROLLING.—The sufficiency of the signatures to such a petition is to be tested by the last general municipal election held in the city prior to the adoption of the charter, if it be conceded that the election held after such adoption was not a general municipal election, by reason of the fact that councilmen were not elected in all of the wards of the city.

ID.—DIRECT LEGISLATION BY CITIES AND TOWNS—ACT INAPPLICABLE TO CITY OF BAKERSFIELD.—The act to provide for direct legislation by cities and towns, including initiative and referendum (Stats. Ex. Sess. 1911, p. 181), and which requires such petitions to be signed by qualified electors of the city or town "equal to ten per cent of the entire vote cast therein for all candidates for Governor of the state at the last preceding general election at which a Governor was voted for," has no application to the city of Bakersfield, even if it be conceded that the referendum provisions of the charter of such city are modeled upon the terms of such statute.

APPLICATION for a Writ of Prohibition originally made to the District Court of Appeal for the Second Appellate District to restrain the holding of a referendum election.

The facts are stated in the opinion of the court.

Short & Sutherland, and Borton & Theile, for Petitioner.

E. F. Brittan, and Walter Osborn, for Respondents.

THE COURT.—Prohibition. On the twentieth day of September, 1915, the city council of the city of Bakersfield adopted an ordinance relating to the regulation and control of the operation of automobile buses within that city. Within thirty days thereafter there was filed with the city clerk an instrument protesting against the passage of the ordinance. This protest was signed by 880 electors of the city. The council having declared this protest sufficient to require a referendum vote upon said ordinance, have ordered an election and referendum thereon to be held on the eleventh day of January, 1916. The petitioner claims that the protest is insufficient to authorize such election or to cause a suspension of the ordinance, and in support of this claim alleges that the protest does not contain the names of a sufficient number of electors. The respondents have filed a general demurrer to

the petition herein, and it has been stipulated that the case may be disposed of in accordance with our decision upon that demurrer.

The present charter of the city of Bakersfield was adopted by the electors of that city at an election held on the seventh day of November, 1914, and, after its approval by the legislature, was filed with the Secretary of State on January 23, 1915. (Stats. 1915, p. 1552.) Section 32 of the charter provides for referendum elections, and it is there required that a petition protesting against the passage of an ordinance must be "signed by electors of the city, equal in number to twenty-five per centum or more, of the entire vote cast at the last general election." It is further provided that "the council shall submit the ordinance to the electors of the city either at the next general municipal election, or at a special election, and such ordinance shall not go into effect unless a majority of the electors voting on the same shall vote in favor thereof. The provisions of article VII respecting the forms and conditions of the petition and the mode of verification and certification and filing, and the ballot to be used, shall be substantially followed, with such modifications as the nature of the case may require." The petitioner contends that the general election referred to in section 32 is the last general state election, and not the last general municipal election. It is conceded that if the required number is to be tested by the vote cast at the last general municipal election, the number of signatures upon the protest was sufficient; and it is shown by appropriate allegation in the petition that the entire vote cast within the city of Bakersfield on the third day of November, 1914, at the general election held on said date, at which a Governor was elected, was 6,046.

Section 67 of the charter is in article VII relating to elections, and provides that within ten days after the charter shall have been ratified by the legislature and the necessary certified copies thereof have been filed and recorded, "the governing body of the city of Bakersfield shall call a nominating election and a general election, under the provisions of this charter, to elect officers as herein provided." The officers thus elected are to hold office until their successors are elected and qualified; and it is provided that "a general election shall be held on the second Tuesday of April of the year 1917, and each odd-numbered year thereafter," etc.



Reading together the several sections of the charter which have relation to the question at issue, we are satisfied that the words "general election," as contained in section 32, are there used in the same sense in which the same words are used in section 67, and that they refer to the last general municipal election.

The petition herein directs the court's attention to the fact that at the nominating election held on April 6, 1915, in the city of Bakersfield, councilmen were elected in three of the seven wards of the city; that (except members of the board of education, as to which the district includes territory outside the city limits), no other officers than councilmen were required to be elected under the provisions of the charter; and that at the so-called general election held on May 7, 1915, no election was held in the said three wards. For this reason petitioner contends that there was no general election. Even if this were conceded, it would not aid the case of petitioner. If no general municipal election was held by the city of Bakersfield since the adoption of this charter, the test would relate back to the last general municipal election preceding the adoption of the charter. Petitioner does not deny that under such test the protest to which this petition refers would be found sufficient.

There is a general law entitled "An act to provide for direct legislation by cities and towns, including initiative and referendum." (Stats. Ex. Sess. 1911, p. 131.) Conceding that that act does not apply to the city of Bakersfield, counsel for petitioner argue that the referendum provisions of the city charter are modeled upon the terms of that statute; and that, notwithstanding some differences between the charter provision and the provisions of the statute, the court should apply the rule that one statute founded upon another is deemed, in so far as it follows the terms of the previous statute, to adopt also its meaning. The statute provides for referendum petitions which shall be signed by qualified electors of the city or town "equal to ten per cent of the entire vote cast therein for all candidates for Governor of the state at the last preceding general election at which a Governor was voted for." The argument is not convincing. We have no evidence that the referendum provisions of the charter were drawn from those of the statute to which counsel refer; and even if they were so derived, the failure to copy words

distinctly defining the last preceding general election as a state election serves to indicate that the charter framers preferred that the protest against the adoption of an ordinance should be signed by at least twenty-five per cent of the number of electors voting at the last general municipal election, rather than that the test should be ten per cent of the entire vote cast at a state election.

The demurrer is sustained and the petition for writ of prohibition herein is denied.

[Civ. No. 1423. Third Appellate District.—December 31, 1915.]

LUKA PERICH et al., Appellants, v. SADIE MAURER
et al., Respondents.

BOUNDARY—CITY LOTS—SUFFICIENCY OF EVIDENCE.—In this action in ejectment and for damages for the unlawful detention of land, which involved the location of the boundary line between two lots in the city of Sacramento, upon the dividing line of which a fence had existed for probably forty years, or more, it is held that in view of the meager character of the evidence of the real boundary line as located and fixed by the original survey of the city (Sutter survey of 1848 or 1849), and in accordance with which the deeds of the parties were made, and of the existence of the fence, and of the inclusion of the disputed strip in the inclosure of the defendant, the court was justified in finding that the plaintiffs had failed to establish any title to the property in controversy.

APPEAL from a judgment of the Superior Court of Sacramento County. C. N. Post, Judge.

The facts are stated in the opinion of the court.

W. A. Gett, for Appellant.

M. S. Wahrhaftig, for Respondent.

BURNETT, J.—The action was in ejectment and for five hundred dollars' damages for the unlawful detention of the land, and the judgment was in favor of defendants for costs. The real question in the case concerns the location of the boundary line between the land of plaintiffs and that of de-

fendants. It was admitted that each of the parties deraigned title from John A. Sutter, the plaintiffs to the "east 35 feet of lot 2 in the lot between N and O streets and Fifth and Sixth streets in the city of Sacramento and the defendants to the west one-half of lot No. 3" in said block. It is shown very clearly that there is, and has been for many years, probably forty or more, a fence on the dividing line as claimed by respondents. Their dwelling-house in the rear also extends to this line, and the entire holding of respondents is, and has been for many years, inclosed. It is the contention, however, of appellants that respondents have included in their inclosure a strip about twenty inches in width belonging to the former, and thus the controversy has arisen.

To establish their claim plaintiffs called D. R. Cate, a civil engineer, who testified that in 1911 he surveyed the lots in question, that it was an accurate survey from the "monuments of the city as they were found at the intersection," that according to said survey the west fence of Mrs. Maurer was over on the land of Mr. Perich; "at N Street it is 1.58 feet; 20.3 feet, back from N—that is, toward the alley—it is 1.26 feet. The porch that goes up into the house is 1.9 feet over. The main part of the building back of the porch is over 1.56 feet and the back end of the building is 1.21 feet. The barn which is 129.68 feet from N Street is 1.81 feet. That is where the fence joins the barn." The way he traveled in reaching the foregoing conclusion is indicated by his statement in answering questions of the court to the effect that he found there were 400.95 feet between "stones—between the centers of street intersections"; that, taking forty feet for the half of Fifth Street and forty for the half of Sixth Street there would remain 320.95 feet to be divided into four lots or "practically eighty feet and a quarter for each lot." According to this calculation he located the boundary line between plaintiffs and defendants at varying distances, with a maximum, as we have seen, of over twenty inches farther east than said fence and improvements would indicate.

For the defendants, one J. C. Boyd, a civil engineer and surveyor of long experience, testified: "There were practically two surveys of the entire city as a whole; the first in laying out of the city originally by Sutter; subsequently, in 1878, a resurveying by L. S. Bassett, then city engineer, who attempted to adjust the apparent difference in the property

ownership to the line of the streets, for the purpose of street improvement largely, and for the purpose of rectifying errors that were shown to have been made by private surveys of private property, lots, and so forth. It had been the custom theretofore to make surveys from the established monuments, from buildings, taking the nearest building as being a corner, approximately correct, and run out from that"; that the Sutter survey was made in 1848 or 1849 and the Bassett survey in 1878; that these two surveys do not agree, that Bassett attempted to adjust differences through the city, that his policy "was to run a line for several blocks as long as possible, the longer the better, and adjust it with existing conditions"; that there is no way of determining whether this recent survey "conforms to the original survey, the Sutter survey"; that he considered that there was physical evidence that there was a line fence established by agreement between the coterminous owners and "the only monument that we could accept of the old Sutter survey would be the consideration of old buildings"; furthermore, that the Bassett survey "most assuredly is not the accepted survey at this time for the measurement of lots in the city of Sacramento," and "that considered in the light of the original survey, I do not think there is any part of lot 2—as originally surveyed—in this inclosure," declaring this was his professional opinion from a physical examination of the entire block including the said fence and "other collateral evidence."

The foregoing is substantially all of the expert testimony in the case. In addition, as we have stated, the evidence is ample of the occupancy and inclosure for many years in accordance with the claim of respondents, although the proof falls short of title by prescription. The court found specifically: "That plaintiffs and defendant Sadie Maurer have deraigned their respective titles from the same grantor, to wit, J. A. Sutter; that said J. A. Sutter had surveyed and laid out the blocks and lots in the said city of Sacramento, over sixty years ago, and that all the monuments of such survey have been obliterated; that since that time, there has been no official survey adopted by the city of Sacramento, except that one city surveyor, Bassett, in or about 1878, caused an arbitrary adjustment of the various subdivisions within the then city limits of the said city of Sacramento, so as to facilitate the uniform grading or paving of streets and sidewalks, and such survey

of adjustment has been and now is conformed to by the said city of Sacramento, and for the purposes aforesaid; at plaintiffs' claim of twenty inches is based upon the arbitrary survey of the said city surveyor Bassett; that the dividing line, according to said arbitrary survey of Bassett, was not and is not the true line as surveyed and laid out by the common grantor, to wit, J. A. Sutter.

"That defendant Sadie Maurer and her grantors have continuously, for a period of over forty years, owned and occupied the land and premises described in her answer to the plaintiffs' complaint herein, and paid taxes therefor; that during all of that time, and probably much longer than such period of time, a fence between her land and that of the plaintiff was taken and considered by all as the dividing line; that the land of the defendant Sadie Maurer has for that length of time been inclosed, and so inclosed was all of that time occupied as the land of said defendant and her grantors, described in her answer to plaintiffs' complaint herein; that plaintiffs bought the adjoining land also inclosed by fences, and as so inclosed."

The evidence is meager, but, no doubt, it was difficult to secure evidence of the boundary line as located and fixed at the time of the Sutter survey.

As to the showing made by plaintiffs, it is apparent that it was quite incomplete and unsatisfactory. They bore the burden of proof, and it is at least doubtful whether there was sufficient evidence to support a finding in their favor. According to the Bassett survey, it is true, they have the legal title to the strip of land, or at least a portion of it, which they claim in their complaint. But the real boundary line was determined by the Sutter survey and the deeds were made in accordance with that survey. To that we must look, therefore, for the location of said line. The Bassett survey was made, admittedly, thirty years subsequent to the other, and we are left largely to conjecture as to the degree of correspondence, if any, between the two. The contention that the later survey is virtually a duplication of the earlier is based upon the assumption that the monuments found at the intersections of the streets by Bassett were recognized by Sutter and that the lots as established by the latter were all of the same size. As to these points the record is entirely silent,

and we cannot forbear feeling that the case made out by plaintiffs is hopelessly weak.

We are not required, however, to hold that a judgment in favor of plaintiffs would be unsupported, as there is substantial evidence to uphold the contention of defendants. As to this, we observe the opinion of the expert Boyd that there is no part "of lot 2 as originally surveyed" within defendants' inclosure. There was no objection made that this was not a matter of expert testimony. Besides, the witness proceeded to state certain facts tending at least to support his conclusion. The most important of these, probably, was in reference to the fence which has been claimed for so many years as marking the boundary line. The fence itself is a monument, visible and obtrusive, which has existed for forty years or more, that under the peculiar circumstances of this case is quite persuasive in favor of the claim of defendants. It is a fair presumption that this fence was originally placed upon the true line as then recognized and understood, and it is proper to assume, in the absence of evidence to the contrary, that when the fence was built, either that the contiguous owners had knowledge and information of the lines of the Sutter survey and acted accordingly, or that the true line was uncertain and by agreement it was fixed and marked by said fence. It is not surprising that this fence seemed so important to Boyd and to the trial judge. Its existence for so many years, the recognition accorded it as the true boundary, the acquiescence of the respective owners in the location and the improvements made accordingly were rightfully regarded as important, if not decisive, considerations in the determination of a line otherwise obscure and uncertain. It is true that no one testified directly that the boundary was actually located on the ground or that there was uncertainty in reference to it, but such may be fairly inferred from the various facts disclosed, and we may invoke the principle announced in *Schwab v. Donovan*, 165 Cal. 360, [132 Pac. 447], and cases therein cited. This must be especially true since there is no clear and satisfactory showing here that the legal title is different from what is indicated by the fence.

Of course, it is true, as said in *Dierssen v. Nelson*, 138 Cal. 398, [71 Pac. 456], that "the building of a fence does not always conclude the parties as to the boundary line; it may

have been built for mere temporary purposes and with no intent to make it the permanent boundary and it may have been the result of a clear mistake or fraud; but nothing of that kind appears in the case at bar." Not only does nothing of that kind appear here, but the rational inferences are contrary, as we have seen.

Again, considering the imperfect showing of plaintiffs and the fact that the Bassett survey was repudiated by expert Boyd as a safe criterion by which to gauge the Sutter survey, we may conclude that the court was entirely justified in holding that plaintiffs had failed to establish any title to the property in controversy. Even further, it may be admitted that the evidence as to the fence was insufficient to locate the boundary line as contended for by respondents. The result of this view of the record would be, of course, a vindication of the judgment for defendants for costs. Moreover, without dispute, it was established that defendants and their predecessors are, and have been for many years, in possession of the property. This mere occupancy is a species of title which would prevail, manifestly, over no title at all.

We think there is no doubt that considerations of equity as well as the exacting requirements of the law demand an affirmance of the judgment, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1409. Third Appellate District.—December 31, 1915.]

JAMES McMUNN et al., Respondents, v. ALBERT W. LEHRKE, Appellant.

TRIAL—LACK OF NOTICE—NEW TRIAL.—A defendant in an action against whom a judgment is rendered is entitled to a new trial where the trial was had in the absence of the defendant and of counsel representing him, and it is made to appear that no notice of the time of trial was given to the attorneys of record of the defendant or to the attorney whom the defendant was endeavoring to have substituted for them, or to the defendant himself, except by the mailing of a card to him by the clerk of the court.

ID.—ATTORNEY AND CLIENT—CEASING TO ACT—DUTY OF ADVERSE PARTY.

Where upon the calling of a case for trial it appears that the defendant had attorneys of record who, in the language of section 286 of the Code of Civil Procedure, had "ceased to act as such" and were not present, and that the defendant was without a representative, the adverse party must, before any further proceedings are had against the party thus situated, by written notice, require such party to appoint another attorney or to appear in person.

ID.—APPEARANCE BY ATTORNEY—DUTY OF COURT.—A party to an action has the right to change his attorney, but such change must be effected in the manner provided by the statute, and where a party to an action or proceeding appears in court by an attorney, he must be heard through him.**ID.—CONSTRUCTION OF SECTION 473, CODE OF CIVIL PROCEDURE—REMEDIAL PROVISION—DISCRETION.**—The remedial provision of the statute found in section 473 of the Code of Civil Procedure is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure, and the discretion of the court ought always to be exercised in such manner as will subserve rather than impede or defeat the ends of justice.

'**APPEAL** from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial. Thomas C. Denny, Judge.

The facts are stated in the opinion of the court.

W. H. Mahony, for Appellant.

McNair & Stoker, for Respondents.

CHIPMAN, P. J.—This is an action in which plaintiffs seek to recover payments made by plaintiffs upon two contracts in writing by which plaintiffs agreed to buy and defendant agreed to sell two certain five-acre lots of land. Defendant filed a verified answer admitting the execution of the contracts referred to in the complaint and that payments had been made thereon as alleged, but denied that plaintiffs expended the sum of \$30 or any other sum for improvements of said property; alleged that plaintiffs failed to make the payments stipulated to be paid, and "that more than two months elapsed after the nonpayment . . . and that defendant thereupon elected to terminate the said contracts and did thereupon terminate said contracts according to the terms of said agreement"; denied that, in May, 1914, or at any

other time defendant requested plaintiffs to relieve him from carrying out the said contracts in consideration of which defendant would either refund to plaintiffs the payments made by them or offer plaintiffs other land in lieu of the land described in said contracts; denied that plaintiffs accepted said or any proposition, or that plaintiffs released defendant from said or any obligation to perform the aforesaid contracts in consideration of the promise then made by defendant or at all; denied that plaintiffs ever demanded of defendant that he either repay said money or offer plaintiffs said or any land in lieu of the land described in said contracts.

The cause came on for trial January 28, 1915, and the court found that "all the allegations of the complaint herein are true and sustained by the evidence; and that none of the denials or allegations of the defendant's answer is true, except such thereof as admit allegations in plaintiffs' complaint." Judgment went accordingly for plaintiffs.

It appears from the engrossed statement on motion for a new trial that "the cause was called for trial in the absence of the defendant, and in the absence of counsel representing the defendant on the twenty-eighth day of January, 1915, the plaintiffs appearing and being represented by counsel, Messrs. McNair & Stoker, whereupon the following proceedings were had and taken on the following oral and documentary evidence adduced, viz.: The Court: McMunn v. Lehrke. Mr. Stoker: Ready for plaintiffs, your Honor. The Court: Proceed. There don't seem to be anybody else here. Mr. Stoker: I desire to read an affidavit, if the court please, and after reading it, I will ask the clerk to file it. Affidavit of T. J. Butts, one of the attorneys of record in this action, and as far as that is concerned, he still appears as attorney of record." Then follows Mr. Butts' affidavit which was sworn to on January 27, 1915, the day before the trial. The affiant stated that "he was one of the attorneys for the defendant above named, and as such prepared the answer which defendant verified, and which was filed in the above-entitled cause." (The answer was filed December 5, 1914.) That on his own motion affiant had the cause set for trial for Tuesday, January 26, 1915; that, "some time during the month of December, 1914," defendant was in affiant's office in the city of Santa Rosa, "at which time affiant advised defendant that said cause had been set for trial for

Tuesday, January 26, 1915. That thereafter and during the month of December, 1914, the said Albert Lehrke informed this affiant and R. L. Thompson, the associate of this affiant in said action, that he had placed all his matters, including said case, in the hands of an attorney at San Francisco, and that neither this affiant nor the said R. L. Thompson would represent him any further, and that neither this affiant nor the said Thompson has had anything further to do with any of the matters in which the said Lehrke was interested, and that said attorney from San Francisco has been representing him ever since said time." At the request of Mr. Stoker, Mr. Butts' affidavit was read into the record. Mr. Stoker stated that the cause had been regularly set for trial, on motion of defendant's attorney, "for last Tuesday" (January 26, 1915), and, he continued, "I believe on the court's own motion it was carried over until today (January 28), and the clerk advised me he wrote Mr. Lehrke advising him of that fact. At any rate, I understand Mr. Lehrke was not here either by counsel or in person last Tuesday. The Court: That is a fact, is it, Mr. Clerk? Clerk: Yes, your Honor. I dropped him a card stating that the case was set for the 28th, and if he had an attorney to advise him of the matter. The Court: Proceed with the case. Mr. Stoker: Mr. McMunn, be sworn." And the trial thereupon proceeded to judgment.

Among the grounds now urged for a reversal of the order it is claimed that the court was without jurisdiction to try the cause; that defendant did not appear at the trial through accident and surprise which ordinary prudence could not have guarded against; and that the court erred in proceeding with the trial in the absence of defendant, after it was made to appear that the defendant's attorneys had ceased to act as such. It becomes necessary to state the facts as they were before the court at the hearing of the motion.

In his affidavit filed with the motion for a new trial, defendant deposed: That he received no notice and had no knowledge that the cause had been set for trial for January 28, 1915, or at any other time, and had he known that the cause was set for trial he would have appeared and presented his defense to the action; that after service of summons he employed Messrs. R. L. Thompson and T. J. Butts, attorneys at law at Santa Rosa, as his attorneys in said cause; that they appeared therein and filed a demurrer and answer; that

affiant was not informed by T. J. Butts or any other person that the case had been set for trial for January 26, 1915; that since the fifth day of February, 1915, he was informed that, on January 21, 1915, the court made a minute order on its own motion and without notice to affiant and in the absence of his attorneys "that this cause be reset for trial for January 28, 1915"; that affiant did not at any time, either by mail or otherwise, have notice or knowledge of the order setting the case for trial for January 28th; that at all times since the commencement of the action he was a resident of Vineburg, in Sonoma County, at which place was an established United States postoffice, and was "affiant's regular and sole postoffice address in said county"; that he relied on his said attorneys "to represent him and to protect his interests in said litigation as long as they remained his attorneys of record and so continued to rely upon said attorneys until on or about February 6, 1915, when for the first time affiant was informed that a trial of said action had been had and that a judgment had been rendered against said affiant therein; that he then learned that an affidavit made by T. J. Butts, one of said attorneys of said affiant, had been presented to the court upon said trial and read and offered in evidence, wherein it was made to appear that for a long time prior to the date of said trial the said Thompson and Butts had ceased to act for said affiant as his attorneys in said action; that it is not true, as set forth in said affidavit of said Butts, that during the month of December, 1914, the said Butts advised affiant that said cause had been set for January 26, 1915." That affiant did not inform said Thompson and Butts, or either of them, that he had placed all his matters including this action in the hands of an attorney in San Francisco or elsewhere, and that neither said Thompson nor Butts would represent affiant thereafter; "but in this behalf affiant says the facts were: That prior to December 7, 1914, to wit, on or about the twenty-fourth day of November, 1914, affiant expressed to his said attorneys Thompson and Butts, his desire to employ his present attorney herein, but that no substitution or change of attorneys was then or there agreed to; that said attorneys Thompson & Butts then and there expressed their willingness to make the change of attorneys suggested, and stated that they would at a later date provide the necessary and formal substitution to be executed; and

that they would in the meantime look after said cause and represent affiant therein until such substitution was made and given. That affiant relying upon said promise and not knowing that any immediate proceedings would be taken in said action requiring the attention of counsel, affiant did not apply to the court for an order changing the attorneys herein, and said substitution was for those reasons left in abeyance. And affiant further says, that said Thompson & Butts, did not give in fact make or give their said substitution of attorneys for affiant in said action until the fourth day of February, 1915." That subsequently, to wit, on the seventh day of December, 1914, the said T. J. Butts, acting as one of the attorneys for affiant in said action, moved the court for an order setting said cause for trial, "and on his said motion the court set the same for trial for January 26, 1915."

In opposition to the motion, Mr. Geo. E. Stoker, one of plaintiffs' attorneys, made affidavit, in the course of which he introduced the affidavits and records filed at the hearing of the motion to vacate the judgment which motion seems not to have been passed upon. Mr. Stoker stated no facts bearing upon the question of his own knowledge except what took place at the trial already set forth. It appeared that defendant made a deposition at the hearing of the motion last above referred to in which the facts stated are substantially as in the affidavit above shown. He stated, however, that he received communications from Mr. Thompson during the month of December, 1914, but no reference was made in any of them that the cause had been set for trial or that either he or Mr. Butts had ceased to act as his attorneys. He deposed further: "That before the filing herein of this affiant's answer he made a full, complete and fair statement to his attorneys, Messrs. T. J. Butts and R. L. Thompson, of all the facts of the case in the foregoing entitled action and was by his last named attorneys informed, and he believes that he has a good defense to said action upon the merits."

Attorney W. H. Mahony deposed: That on or about November 24, 1914, he was consulted by defendant in relation to certain litigation then pending in the county of Sonoma in which defendant was then represented by Messrs. Thompson and Butts of Santa Rosa; that he informed defendant he would not accept employment before consulting his present attorneys and that he could not legally act in said mat-

ters before "receiving from said present attorneys and filing a substitution of attorney authorizing him to do so"; that thereafter, on or about November 25, 1914, affiant went to Santa Rosa, called upon R. L. Thompson, one of said attorneys, "informed him of defendant's desire to employ him to act as attorney in the matters then being conducted by said Thompson & Butts, including the above-entitled action," and that he did not wish to interfere with their employment unless satisfactory to them; that said Thompson expressed his willingness to be relieved from further responsibility in said litigation, and that though they had not been paid for their services, "he knew that the defendant was responsible and would pay them without trouble"; that, on said November 25, 1914, affiant received from said Thompson and Butts substitutions of attorney in two cases other than the present case in which they had been acting for defendant, and at that time the said Thompson promised to forward to affiant by mail substitution of attorney in the present case and also in one entitled *Lehrke v. Nelson*; that, on November 26, 1914, affiant informed defendant of the result of his interview with said Thompson and that affiant had decided to accept said employment and had accepted substitution in two cases; that affiant had been promised substitution in the present case, "and would assume control as soon as he received said substitution, but could not do so otherwise"; that affiant met said Thompson in the courtroom at Santa Rosa on December 15, 1914, and he again promised to forward to affiant by mail substitution of attorney in said last two mentioned cases, together with the papers in said action; that said Thompson not having sent substitutions as promised, affiant wrote to him on January 4, 1915, requesting him to send them; that said Thompson replied, on January 6th, by letter (which is set out in the record), stating that since talking with affiant he had concluded he should be paid in the *Nelson* case before making the substitution; that he had so written defendant and that he simply wished to explain the delay "in forwarding papers"; that, on January 7, 1915, Mr. Mahony wrote Mr. Thompson explaining that defendant was then in the mountains where he expected to remain ten or twelve days; that affiant forwarded Mr. Thompson's letter to defendant immediately; that on January 13, 1915, affiant met attorney Butts at Sacramento in the courtroom of the district court of

appeal, and informed him that he had not received from Mr. Thompson the substitution in the McMunn case "and could not assume to act in said case as attorney for defendant until formally authorized to do so, whereupon said Butts replied that he would see that the substitution of attorney was forwarded to me by Mr. Thompson"; that affiant did not receive said substitution and heard nothing from Mr. Thompson until February 4, 1915, when affiant telephoned said Thompson "to inquire the status of the case at bar and was told by said Thompson he did not know the condition of the case"; that affiant again requested substitution and, on February 5, 1915, he received a letter from said Thompson inclosing substitutes in the McMunn case and Nelson case "with office copies of the pleadings and copies of contract in the first named case (McMunn v. Lehrke); that, on February 6, 1915, affiant went to Santa Rosa and then for the first time discovered that a judgment had been entered against defendant Lehrke on January 28, 1915; and that affiant, at no time prior to February 6, 1915, was informed that the case had been set for trial, or that a judgment had been entered therein.

Attorney Thompson testified that he had not been consulted by defendant relative to the facts and "only knew in a general way that such a case was in the office"; that his associate, Mr. Butts, had charge of the case and prepared the answer; "that he did not remember that W. H. Mahony, the present attorney for defendant, ever mentioned the case of McMunn v. Lehrke in any of the conversations had between himself and said Mahony, and referred to in said Mahony's affidavit"; that he did remember Mahony's request for substitution in the Nelson case which was in witness' personal charge; that when he wrote to Mr. Mahony, January 6, 1915, "he did not have the case of McMunn v. Lehrke in mind," nor later until receiving Mr. Mahony's letter of February 2, 1915, in which he asked for such substitution and he thereupon prepared and sent the same to him.

Without attempting to analyze the various statements of facts thus appearing or separating uncontradicted facts from such as are in more or less conflict, it seems to us the learned trial court erred in denying the motion and upon a question not wholly the subject of judicial discretion. It is undisputed that Messrs. Thompson and Butts were defendant's

attorneys of record when the case was set for trial for January 26, 1915; that they were his attorneys of record when the court, of its own motion, on January 21st, reset the case for January 28th, in their absence and in the absence of defendant, and there is no evidence that they were notified of the order of January 21st or that they knew that the cause was to be tried on January 28th. The clerk stated, in response to the inquiry of the court whether the defendant had been advised of the trial, that he "had dropped him a card stating that the case was set for the 28th and if he had an attorney to advise him of the matter." This was not legal service of notice such as the law requires, nor was service made upon defendant's attorneys, the persons upon whom it should have been made. The affidavit of Mr. Butts was introduced by Mr. Stoker as "affidavit of T. J. Butts, one of the attorneys of record in this action, and as far as that is concerned, he still appears as attorney of record."

It is true that Mr. Butts knew the case was set for January 26th, and he deposed that, some time in December, he so told defendant, and it is urged that had the attorneys for defendant appeared on the 26th, they would have learned of the order of January 21st resetting the case for January 28th, and defendant cannot now be heard to complain of their default. But we do not think that knowledge of the order of January 21st can be imputed to them because of their failure to appear on January 26th. The order setting the trial for that day was superseded and was no longer in effect.

Both defendant and his attorney, Mr. Mahony, testified that they had no notice or knowledge that the case was set for trial for January 28th, and it does not appear that either Mr. Thompson or Mr. Butts had notice.

Section 284 of the Code of Civil Procedure provides as follows: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." Section 285 provides that, "When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the

adverse party. Until then he must recognize the former attorney." Section 286 provides that, "When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

It is undisputed that, early in December, 1914, defendant was endeavoring to dispense with the services of Messrs. Thompson and Butts and to engage Mr. Mahony. The latter made reasonable efforts to be substituted as defendant's attorney by applying to defendant's attorney of record, who refused to make the substitution though claiming that they had ceased to be defendant's attorneys. Later and before the trial they promised to make the substitution but failed to do so. Mr. Mahony took the position, rightfully, that he had no authority to act until substituted in their stead and he so advised defendant. In the meantime, without notice to either Thompson and Butts or Mahony, or defendant, the cause came on for trial and was tried in the absence of defendant and his attorneys. The only service of notice of the trial attempted was by the clerk, as we have seen, who testified that he "dropped a card" to defendant "stating that the case was set for the 28th." But this was no evidence at all of notice to defendant. The statute points out the method by which service by mail is to be proven (Code Civ. Proc., secs. 1012, 1013), and it was not followed. If plaintiffs knew that Thompson and Butts had "ceased to act" as defendant's attorneys, it was plaintiffs' duty, before any further proceedings were had against defendant, to require defendant "by written notice to appoint another attorney, or to appear in person." (Code Civ. Proc., sec. 286.) If plaintiffs did not know that Thompson and Butts had "ceased to act," notice of the trial should have been served upon them. (Code Civ. Proc., sec. 285.) But, the day before the trial, plaintiffs, for some unexplained reason, obtained Mr. Butts' affidavit, from which it appeared that neither he nor Mr. Thompson represented defendant, and plaintiffs' attorney stated to the court that they were still defendant's attorneys of record. The court, therefore, was advised when the case was called that the defendant had attorneys of record who, in the language of section 286, *supra*, had "ceased to act as such" and were not present, and that the defendant was with-

out a representative. In such a case the statute provides that before any further proceedings are had against a party thus situated, the adverse party must, by written notice, require such party to appoint another attorney or to appear in person.

It seems to us that the court was without authority to proceed with the trial. We are further of the opinion that if it was within the discretion of the court so to proceed, it was, under all the circumstances, an abuse of discretion to do so, and that defendant should be relieved from the consequence of his default.

A party to an action has the right to change his attorney, "yet such change must be effected in the manner provided by the statute" (*Gill v. Southern Pac. Co.*,* 21 Cal. App. Dec. 821); "and where a party to an action or proceeding appears in court by an attorney he must be heard through him." (*Id.*) "As long as he has an attorney of record to an action the court cannot recognize any other as having management or control of the action, and the party can act only through his attorney. (*Boca & Loyaltan R. R. Co. v. Superior Court*, 150 Cal. 153, [88 Pac. 718].) In the case of *Toy v. Haskell*, 128 Cal. 558, [79 Am. St. Rep. 70, 61 Pac. 89], the plaintiff, without the knowledge or consent of his attorneys of record, signed and delivered to defendant's attorneys a written stipulation authorizing a dismissal of the case, which was accordingly done. The lower court denied a motion to set aside the judgment. On appeal to the supreme court the order was reversed, the court saying: "A party must be heard in court through his attorney, when he has one, and the court has no power or authority of law to recognize anyone in the conduct or disposition of the case except the attorney of record."

In *Nicol v. San Francisco*, 130 Cal. 288, [62 Pac. 513], plaintiff's attorney died and plaintiff appointed an attorney, who appeared at the hearing of the motion to dismiss the action. He challenged the jurisdiction of the court because of failure to serve the notice required by section 286 of the Code of Civil Procedure. The court said: "If the plaintiff had failed to appear at the hearing upon the fifteenth day of April, either personally or by attorney, then the lack of service of such notice would probably have been good cause to

*On February 7, 1916, this case, by order of the supreme court, was transferred to the supreme court for further hearing.

justify the invoking of the aforesaid provision of the statute," but because of his appearance by attorney and his having litigated the matter upon its merits, the court said, "any question of lack of jurisdiction upon the part of the court to proceed with the hearing is eliminated from the case."

Speaking of the remedial provision of the statute found in section 473 of the Code of Civil Procedure, the court said, in *Melde v. Reynolds*, 129 Cal. 308, [61 Pac. 932]: "It is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised in such manner as will subserve rather than impede or defeat the ends of justice."

The judgment and order are reversed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 1776. Second Appellate District.—January 8, 1916.]

GRACE HILBORN, Respondent, v. CARL B. SOALE et al.,
Appellants.

FRAUDULENT CONVEYANCE—ACTION BY JUDGMENT CREDITOR—INTENT OF PARTIES—DUTY OF COURT.—In an action by a judgment creditor to set aside a conveyance of real property on the ground of fraud, the trial court is required in making up its conclusions to take into consideration all of the circumstances surrounding the transaction and determine from them as to what the intent of the parties really was.

ID.—ACTION TO SET ASIDE DEED—FRAUD—SUFFICIENCY OF EVIDENCE.—In this action by a judgment creditor of a husband to have a deed of real property executed by the husband to his wife declared void as having been made without consideration and for the purpose of preventing the satisfaction of plaintiff's judgment, it is held that the evidence supports the finding that at the time the judgment was obtained the husband held a joint tenant's interest in the property, which he had acquired by gift from his wife, and that therefore there could be no return gift made by him to her which would have the effect of defeating the claims of his creditors.

ID.—PLEADING—CAPACITY OF PLAINTIFF.—In such an action it is not necessary to set out in the complaint the history of the litigation or an abstract of the pleadings of the action in which the judgment was obtained. The only material thing to show is that plaintiff is a judgment creditor.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge.

The facts are stated in the opinion of the court.

E. J. Fleming, S. L. Carpenter, and Bennett & Cary, for Appellant Carl B. Soale.

Frank L. Muhleman, Jones & Evans, and Earl T. Miller, for Respondent.

JAMES, J.—Plaintiff, a judgment creditor of defendant Wilson H. Soale, instituted this action to have a certain deed and conveyance executed by said defendant to his codefendant declared null and void as having been made without consideration and for the purpose of preventing satisfaction of plaintiff's judgment. The decree was rendered as prayed for and both defendants appealed.

In the year 1908 the appellants purchased certain real property in the county of Los Angeles, for which a consideration of eight thousand dollars was paid, this money, so the evidence showed, being at the time of the investment the separate property of appellant Carl B. Soale, who is the wife of appellant Wilson H. Soale. A contract of purchase was first entered into on the part of these appellants as vendees, in which contract the amount of money mentioned was agreed to be paid as a consideration for the transfer, and the character of deed mentioned in this contract as required to be given was a "grant" deed. Both of these appellants signed the contract of purchase, and when the deed was made out it contained the recital that the grantors did "grant to Carl B. Soale and Wilson H. Soale, her husband, as joint tenants with the right of survivorship," the property of which a description followed. This deed was recorded on the twenty-first day of July, 1908, in the office of the county recorder. On August 6, 1912, judgment was rendered in favor of respondent herein against appellant Wilson H. Soale. On the following day and before this judgment was entered so as to become a lien against real property standing in the name of said appellant, appellant Wilson H. Soale made his deed which purported to transfer to his wife all of his interest in the real property. Respondent, his judgment creditor, upon the entry of her judgment, caused execution to issue and a levy to be made against the

interest of her judgment debtor in the real property, and then brought this action to have the conveyance of Soale to his wife set aside. Appellants in their answer denied that Wilson H. Soale had any interest in the real property at all, and alleged that the same had been at all times subsequent to the purchase thereof the sole and separate property of Carl B. Soale. This issue was decided adversely to their claims, and the question is presented here as to whether the evidence heard was sufficient to sustain the judgment declared by the court. On behalf of respondent it is insisted that there is ample evidence to support the finding of the trial court that appellant Wilson H. Soale, at the time respondent obtained her judgment against him, held a joint tenant's interest in the property, which he had acquired by gift from his wife. This contention makes it necessary that the evidence be examined in detail. It must be admitted at the outset that, in so far as the express declarations of appellants are shown to have been given in testimony, such declarations negative wholly the claim that there was an intention on the part of the wife to make a gift to her husband of an interest in the real property. The trial judge, however, in making up his conclusions, was required to take into consideration all of the circumstances surrounding the transaction and determine from them what the intent of the parties really was. (*Title Ins. etc. Co. v. Ingersoll*, 153 Cal. 1, [94 Pac. 94]; *Reed v. Reed*, 135 Ill. 482, [25 N. E. 1095]; *Brunner v. Title Ins. & Trust Co.*, 26 Cal. App. 35, [145 Pac. 741].) And if upon this review it may be said that there was some substantial evidence upon which to found the judgment as entered, such judgment cannot be disturbed. As before mentioned, it appeared that both appellants signed the contract of purchase, and, in so far as their relation to that contract is concerned, it would appear to an unadvised third party that they were taking a joint ownership in the property. The wife testified that she gave no direction as to what form the deed was to take, and the husband, when asked regarding any direction which he gave affecting that matter, was stopped by an objection from his counsel, and this objection was sustained by the court. At any rate, it did appear that in the following year, about April, the wife, so she testified, learned of the condition of the deed as to its form and knew that it made her husband the joint tenant in the property with herself. When asked whether, if plaintiff had not obtained a

judgment against her husband, she would have required any change to be made in the deed, she expressed uncertainty and left her testimony as to that particular, subject to a fair inference to be drawn by the court that she would not have required any change to be made. At any rate, she testified that when her husband told her of the fact that judgment had been obtained against him by this respondent, she requested him to make the deed to her, which he did immediately. It fairly appeared, also, that the appellants kept their bank account in a form so that it could be drawn upon by either party. We have, then, it shown in proof that the appellants jointly engaged to purchase the real estate mentioned in the pleadings and that they received a deed by which their interests were declared to be joint, with right of survivorship. As to who gave the direction to have the deed made in this somewhat unusual form, seems immaterial, because the wife, when she learned that it had been so made, raised no objection to it until three years had elapsed, and at the trial fairly intimated that she never would have objected to it had it not been that judgment was obtained against the husband. If she had determined to leave title to the property in such a form as that the husband upon her death should secure her interest in it, then we think a gift of the joint interest was effectuated beyond her power to afterward, and after a creditor had reduced a claim against her husband to judgment, recall. If the gift had become effectual, then there could be no return gift made by the husband which would have the effect of defeating the claims of his creditors. Taking all of the facts and circumstances shown in evidence, we think that it must be said that the judgment finds some support in proof and that it should be affirmed.

In respondent's complaint filed in this action she alleged as preliminary matter the entire history of the transaction upon which she obtained her judgment, which included a recitation of fraudulent acts committed by the appellant Wilson H. Soale. A motion to strike out these matters was made and denied and a bill of exceptions prepared to cover that ruling. Of course, the material thing to be shown by the respondent, the plaintiff, was that she occupied the relation of a judgment creditor. It was not necessary to set out the history of the litigation or an abstract of the pleadings of the action in which the judgment was obtained. Nevertheless, as

respondent suggests, the introduction of the judgment-roll on making proof of the judgment would have shown in substance the same matters which it was sought to have stricken out of her complaint in this action. The fact that appellants admitted the entry of judgment does not render any technical error of the court made by the ruling on the motion prejudicial.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 2, 1916

[Civ. No. 1750. First Appellate District.—January 4, 1916.]

EDWIN F. TORREY, Jr., et al., Appellants, v. CON SHEA et al., Respondents.

SALE—BREACH OF CONTRACT TO DELIVER HOPS—CONTEMPORANEOUSLY EXECUTED INSTRUMENTS—SINGLE TRANSACTION—PAROL EVIDENCE.—

In an action to recover damages for the refusal to make delivery of a designated quantity of hops produced and picked during the season of 1911 upon the ranch of the defendants, as alleged to have been required of such defendants by the terms of a written contract, the defendants are entitled to show by parol evidence, without violating the rule prohibiting the admission of oral evidence to alter, vary, or contradict the terms of a written instrument, the contemporaneous execution of two other instruments calling for similar deliveries in the years 1909 and 1910, and that such instruments with the instrument in suit, by the terms of a collateral contemporaneous oral agreement, constituted but one single and indivisible contract covering a single transaction, but which for the convenience of the parties was expressed in three separate instruments, and which were executed by the parties thereto at the same time upon the consideration and with the understanding and agreement that the three instruments would constitute but a single contract for the purchase and sale of the same quantity of crops per year for three successive years from the crops produced upon the ranch of the defendants; and that therefore the failure of the plaintiffs to accept the full quantity for 1910 justified the refusal to make delivery from the crop of 1911.

ID.—SEVERAL CONTRACTS—SINGLE TRANSACTION—PAROL EVIDENCE.—

While ordinarily the identity of the parties to several instruments will be disclosed by reference to the instruments themselves, the question as to whether or not such instruments were contemporaneously executed and intended by the parties thereto to cover a single transaction oftentimes cannot be ascertained from an inspection of the instruments themselves, and consequently, if the intention be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments.

ID.—DEFENSE TO ACTION—RESCISSION—REFORMATION NOT ESSENTIAL.—

In such an action the defendants are entitled as a matter of law to defend against the action upon the theory that the three instruments constituted but a single contract, and that a breach of one constituted a failure of consideration which entitled them to rescind the whole, and are not obliged to resort to the remedy given by section 3399 of the Civil Code for the reformation of the contract which through fraud or mistake failed to express the intention of the parties.

APPEAL from a judgment of the Superior Court of Sonoma County. H. C. Gesford, Judge presiding.

The facts are stated in the opinion of the court.

J. R. Leppo, for Appellants.

T. J. Geary, and T. J. Butts, for Respondents.

LENNON, P. J.—In this action the plaintiffs sought to recover damages for the alleged breach of a written contract entered into by them with the defendants, whereby the latter agreed to deliver to the plaintiffs, at the city of Santa Rosa, not later than October 15, 1911, forty thousand pounds of hops at eleven cents per pound, of a specified quality, from the hops produced and picked during the season of 1911 upon the ranch of the defendants Shea Brothers in Sonoma County. Judgment was entered for the defendants upon the verdict of a jury, from which the plaintiffs have appealed.

The plaintiffs' complaint alleged that they had duly performed all the terms of the contract on their part to be performed, and that during the season of 1911 the Shea Brothers ranch produced forty thousand pounds and more of hops of

the kind and quality specified in the contract, but that the defendants refused to make any delivery of hops in keeping with the terms of the contract, and sold the season's crop to other parties. The defendants, answering separately, admitted the due execution of the instrument sued upon, but pleaded the contemporaneous making of two other written instruments by the same parties, one of which called for the delivery to plaintiff by the defendants of forty thousand pounds of hops at ten cents per pound from the Shea Brothers ranch during the season of 1909, and the other for the delivery to the plaintiffs by the defendants of forty thousand pounds of hops at eleven cents per pound from the crop grown upon the same ranch during the season of 1910. The answers of the defendants further alleged that these two instruments with the instrument in suit, by the terms of a collateral contemporaneous oral agreement, constituted but one single and indivisible contract covering a single transaction, but which for the convenience of the parties was expressed in three separate instruments, and which were executed by the parties thereto at the same time upon the consideration and with the understanding and agreement that the three instruments would constitute but a single contract for the purchase and sale of forty thousand pounds of hops per year for three successive years from the crops produced upon the hop ranch of said Shea Brothers. The answers of the defendants further alleged that pursuant to the terms of the contract there was delivered to the plaintiffs forty thousand pounds of hops in the year 1909, and that in the year 1910 the defendants delivered to the plaintiffs one hundred bales of hops, aggregating twenty-six thousand pounds, of that year's crop, and thereafter tendered and offered to deliver to plaintiffs fourteen thousand pounds of hops, the balance of the forty thousand pounds deliverable in that year; that the plaintiffs refused to accept the same, and that thereupon the defendants notified the plaintiffs that because of their failure to accept the hops tendered the contract was rescinded and terminated, and that no hops grown upon the ranch of Shea Brothers during the year 1911 would be delivered to plaintiffs under the terms of the contract. The answers of the defendants also alleged that the plaintiffs consented to the termination of the contract, and thereupon settled with the defendants by paying for the hops delivered up to that time.

Under the issues thus raised the trial court ruled—and we think correctly—that the defendants were entitled to show by parol evidence that the three instruments were intended and executed by the parties thereto to cover but one transaction; and that the controlling consideration for the execution of the particular writing in suit, contracting for the delivery of hops during the year 1911, was the contemporaneous execution of the two other instruments calling for similar deliveries in the years 1909 and 1910.

“Several contracts relating to the same matter between the same parties, and made as parts of substantially one transaction, are to be taken together.” (Civ. Code, sec. 1642.) Ordinarily, as in the present case, the identity of the parties to several instruments will be disclosed by a reference to the instruments themselves; but the question as to whether or not several instruments between the same parties were contemporaneously executed and intended by the parties thereto to cover a single transaction, oftentimes cannot be ascertained from an inspection of the instruments themselves; and consequently, if the intention of the parties be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments. (*Johnson v. Levy*, 3 Cal. App. 591, [86 Pac. 810]; *Curtin v. Ingle*, 137 Cal. 95, [69 Pac. 836, 1013].)

The general rule that parol evidence is not admissible to alter, vary, or contradict the terms of a written instrument (Civ. Code, sec. 1698) has, we think, no application to the question presented here. The defendants did not seek nor were they permitted to contradict by parol proof the covenants of the particular instrument in suit. They sought and were permitted to show in evidence a contemporaneous, collateral oral agreement of the parties to the several instruments, to the effect that the subject matter of each instrument should be but a unit in a series of sales which as a whole were to constitute the subject matter of a single transaction, and that the paramount consideration, undisclosed in the instruments themselves, which induced the execution of each instrument was the contemporaneous execution of all three instruments which, when executed, were to constitute a single

contract for the purchase and sale of forty thousand pounds of hops per year during the period of three designated years. The instrument in suit being silent upon the subject of the interdependence of the three writings, and failing to disclose the true consideration, or any consideration save that implied from the mutual covenants of the parties, which induced its execution, obviously the proof proffered and admitted in nowise contravened its express terms; and such evidence was therefore well within the exception to the general rule which permits proof of the execution and existence of an oral agreement collateral to and executed contemporaneously with a written instrument, covering and controlling a material matter agreed to by the parties, distinct from but closely related to the express subject matter of the written instrument and not embodied therein. (1 Elliott on Evidence, secs. 582-585; Stephens on Evidence, art. 90; 3 Jones on Evidence, sec. 439; *Howard v. Stratton*, 64 Cal. 487, [2 Pac. 263]; *Moffatt v. Bulson*, 96 Cal. 106, [31 Am. St. Rep. 192, 30 Pac. 1022]; *Wolters v. King*, 119 Cal. 172, [51 Pac. 35]; *Sivers v. Sivers*, 97 Cal. 518, [32 Pac. 571]; *Guidery v. Green*, 95 Cal. 630, [30 Pac. 786]; *Bonney v. Morrill*, 57 Me. 369; *Michels v. Olmstead*, 14 Fed. 219, [4 McCrary, 549]; *Oregonian Ry. Co. v. Wright*, 10 Or. 162; *Sutton v. Griebel*, 118 Iowa, 78, [91 N. W. 825].) Of course this exception to the general rule can be invoked and applied to a written instrument which *prima facie* purports to embody the complete legal obligations of the parties, only where the established circumstances surrounding and attending its execution warrant the inference that the parties did not intend that it should be a complete and final statement of the whole transaction before them. (*Seitz v. Brewers*, 141 U. S. 510, [35 L. Ed. 837, 12 Sup. Ct. Rep. 46]; 3 Jones on Evidence, sec. 439; Stephens on Evidence, art. 90; *Sivers v. Sivers*, 97 Cal. 518, [32 Pac. 571]; *Savings Bank etc. v. Asbury*, 117 Cal. 96, [48 Pac. 1081].) This exception to the general rule is stated with more precision and perspicacity in Jones on Evidence (volume 3, section 439), where it is said: "The general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct, valid, contemporaneous agreement between the parties which was not reduced to writing, when the same is not in conflict with the provisions of the written agreement. The exception is thus stated somewhat more guardedly by Stephens (Stephens on

Evidence, art. 90). The party may prove 'the existence of any separate, oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them, or the existence of any separate, oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.' "

The same authority, Jones, commenting upon the exception to the general rule, declares the law to be "that agreements or representations made prior to the written contract under which the party was induced to sign the contract, may be shown. In other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract; or when the parol agreement forms part of the consideration for a written contract, and where the written contract was executed upon the faith of the parol contract or representations, such evidence is admissible." (Jones on Evidence, sec. 439, p. 178.)

The reason for the exception to the general rule is to be found in the fact that the exclusion of such evidence, when relevant to the issues joined in a given case, would operate to permit one of the parties to the written agreement to take an unjust advantage of the other by receiving all of the benefits accruing to him under the contract without assuming all of the burdens imposed upon him by the terms of the contract. (*Gibbons v. Bush Co.*, 52 N. Y. App. Div. 211, [65 N. Y. Supp. 215]; 3 Jones on Evidence, sec. 493.)

If we are correct in our understanding of the exception to the general rule and its application to the issues joined and the evidence adduced in the present case, it follows that the trial court did not err in the particular stated; and likewise correctly charged the jury that it was a question of fact for them to determine whether or not the instrument in suit, in conjunction with the other two instruments pleaded and proven in support of the defendants' case, constituted but a single, indivisible contract covering a single transaction. (*First Nat. Bank v. Rothschild*, 107 Ill. App. 133; *Dillon v. Watson*, 3 Neb. (Unof.) 530, [92 N. W. 156]; *Rosenthal v. Ogden*, 50 Neb. 218, [69 N. W. 779]; *Meyer v. Shamp*, 51 Neb.

424, [71 N. W. 57]; *Weeks v. Cris*, 94 Me. 458, [80 Am. St. Rep. 410, 48 Atl. 107].)

Likewise the question of whether or not plaintiffs had failed without just cause to keep and perform the terms and conditions of the contract imposed upon them by the covenants of the instrument covering the transaction for the year 1910, and were induced to repudiate the same not because the hops tendered by the defendants for that year were inferior in quality to those called for by the contract, but rather because the market price of hops for that year had fallen below the purchase price specified in the contract, was a question of fact for the jury to determine; and their determination in that particular having been made adversely to the plaintiffs upon what we conceive to be a substantial conflict in the evidence, cannot, under the familiar rule, be reviewed or revised by this court.

It seems to be one of the contentions of the plaintiffs that the defendants were not entitled as a matter of law to defend against the action upon the theory that the three instruments constituted but a single contract, and that a breach of one constituted a failure of consideration which would entitle the defendants to rescind the entire contract. In this behalf it is insisted that the defendants should have resorted to the remedy given by section 3399 of the Civil Code for the reformation of a contract which through fraud or mistake does not truly express the intention of the parties. Perhaps the defendants, if they had seen fit, might have resorted to the latter remedy rather than to a rescission of the contract, but they were not compelled to do so. If the instruments in question in law and in fact constituted but a single contract, the defendants were entitled to consider and declare the same rescinded and terminated upon the happening of a partial failure of consideration which resulted from the alleged willful and wrongful failure of the plaintiffs to keep and perform an integral part of the entire contract. (*Richter v. Union etc. Co.*, 129 Cal. 367, [62 Pac. 39]; *Sterling v. Gregory*, 149 Cal. 118, [85 Pac. 305].) This is so because the willful and inexcusable failure of one party to perform a material part of a contract on his part to be performed is tantamount to an abandonment of the entire contract; and clearly if the plaintiffs in the present case so failed, they should not be permitted to recover damages for the refusal of the defendants to fur-

ther comply with the contract. (*Graves v. White*, 87 N. Y. 463; *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274. [139 Pac. 671].) And, as was said in *Lake Shore, etc., v. Richards*, 152 Ill. 59, [30 L. R. A. 33, 38 N. E. 773]): "It can make no difference whether a contract has been partially performed, or that the time for performance has not yet arrived, in determining the right of one party to regard it as abandoned by the other; upon election to treat the renunciation of the contract by the other party whether by declaration or acts or conduct, as a breach of the contract, the rights of the parties are to be then regarded as culminating."

It is claimed that the trial court in one of its instructions in effect charged the jury that as a matter of law the three instruments in question constituted but a single contract, and in the same instruction declared that a breach of the instrument covering the purchase and payment for the defendants' hops for the year 1910 would suffice to warrant a judgment for the defendants without regard to its relation to the instrument covering the transaction for the year 1911. We do not think that the instruction complained of, even when considered alone and without reference to the other parts of the court's charge, is susceptible of any such construction; and we are satisfied that when considered and construed in conjunction with the charge of the court as a whole, it correctly stated the law and had no tendency to confuse or mislead the jury.

There is some evidence to support the finding of the jury implied from the verdict to the effect that the plaintiffs willfully and wrongfully defaulted in the performance of their part of the contract covering the transaction for the year 1910, and that thereupon the defendants elected to rescind and cancel the entire contract. These findings are sufficient in themselves to support the judgment; consequently it becomes unnecessary for us to determine whether or not the evidence supports the further finding likewise implied from the verdict that the plaintiffs consented to the rescission and cancellation of the entire contract upon their refusal to accept and pay for the hops tendered to them in 1910.

We think this disposes of all of the points involved upon this appeal.

The judgment appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on March 2, 1916. Angellotti, C. J., and Shaw, J., dissented from the order denying a rehearing by the supreme court.

[Civ. No. 1760. Second Appellate District.—January 5, 1916.]

A. O. HOUGHTON, Respondent, v. C. B. DICKSON, Appellant.

NEGLIGENCE—PHYSICIAN AND SURGEON—DEGREE OF SKILL—IMPLIED CONTRACT.—A physician or surgeon undertaking the treatment of a patient impliedly contracts not only that he possesses that reasonable degree of learning and skill possessed by others of his profession, but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and if he possesses such reasonable degree of learning and in the treatment of the patient exercises ordinary care and skill in applying it, he is not liable for the results that follow.

ID.—NEGLIGENT SURGICAL TREATMENT—INSUFFICIENCY OF EVIDENCE.—In this action against a physician and surgeon to recover damages alleged to have been sustained by the plaintiff as the result of negligent surgical treatment of the plaintiff's arm, it is held that the evidence wholly fails to show any lack of care and skill on the part of the defendant in setting and treating the fractured bone of the arm, and that it likewise fails to show when the dislocation of the elbow occurred, or that a physician in the exercise of ordinary care and skill in treating the plaintiff should have discovered the dislocation and treated the same.

ID.—EXERCISE OF REASONABLE SKILL—QUESTION FOR JURY.—A surgeon does not undertake to perform a cure, nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes a fair, reasonable, and competent degree of skill, and in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to a want of a proper degree of skill and care in the defendant or not.

'APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. J. P. Wood, Judge.

29 Cal. App.—21

The facts are stated in the opinion of the court.

R. P. Jennings, and Jennings & Horton, for Appellant.

J. L. Fleming, and W. S. Knott, for Respondent.

SHAW, J.—This is an action to recover damages alleged to have been sustained by plaintiff as the result of negligent surgical treatment administered to him by defendant.

The case was tried by a jury, which rendered a verdict in favor of plaintiff, in accordance with which judgment was entered against defendant in the sum of three thousand five hundred dollars.

The appeal is from the judgment and an order denying defendant's motion for a new trial; his chief contention being that the evidence was insufficient to justify the verdict.

It appears that on January 25, 1911, due to the kick of a horse, the ulna of plaintiff's right arm was broken, and that, after receiving emergency treatment, he, on the day following the injury, placed himself in the care of defendant, who was a physician and surgeon and who undertook the treatment of the injured arm. The negligence of defendant is predicated, not only upon the alleged fact that in setting and treating the fracture there was a lack of care and skill by reason of which the fractured bone failed to unite, but that the bone known as the radius was at the time or at a later date during the treatment dislocated at the elbow, which fact defendant, by reason of his failure to exercise ordinary care and skill, failed to discover or properly treat.

On January 26th, after an examination of the fractured arm with a fluoroscope, defendant set the arm, using splints to retain the broken bones in place. On the following day he discovered that it would be necessary to wire the fractured ends of the bone and had plaintiff go to a hospital, where the operation of wiring was performed by defendant. After the operation, defendant dressed, bandaged, and otherwise treated the arm until March 29th, on which date plaintiff consulted Dr. Rowley, who found a dislocation at the elbow, of the bone known as the radius; that there had been no union of the ends of the fractured bones; that the wire used in securing the same had broken and that pus had developed in the wound; all of which conditions, except the formation of pus in the wound,

were indicated by an X-ray photograph of plaintiff's arm taken on said last mentioned date. At this time plaintiff placed himself in the care of Dr. Rowley, who treated the injured arm until about May 1st, when he and Dr. Lewis operated upon the arm by cutting off the head of the radius, declared necessary in order to reduce the dislocation, and reset and wired the fractured bone, which, however, as under defendant's treatment, from some cause unknown to Drs. Rowley and Lewis and contrary to their expectations, failed to unite. While plaintiff by his evidence shows in detail just what defendant did in operating upon the arm and in the treatment thereof while under his professional care, he produced no evidence tending to prove that defendant, either in performing the operation or treatment administered thereafter, was guilty of negligence. The condition of the arm on March 29th—that is, the dislocation of the radius; the fact that the wire intended to retain in place the fractured bones had broken; failure of the fractured bones to unite, and supuration of the wound—was not, in the absence of other proof, sufficient evidence that there had been a want of ordinary care and skill on the part of defendant in treating plaintiff's injuries. In short, the record merely shows what defendant did in caring for plaintiff professionally, the condition of the arm existing on and prior to March 29th, when plaintiff placed himself in the care of Dr. Rowley, and what he and Dr. Lewis thereafter did professionally to effect a cure. Indeed, not only is there no evidence of negligence on the part of defendant, but the evidence of both Dr. Rowley and Dr. Lewis, who, by the way, were the only witnesses called on behalf of plaintiff who were competent to testify whether or not defendant had exercised reasonable care and skill in treating plaintiff's injury, tends to prove the contrary. This evidence was to the effect that the nature of the fracture was such as to demand the wiring of the bones, and that the wire used was such as surgeons generally used in such cases; that in operating upon the fracture they used like wire, which in the adjusting thereof likewise broke. Dr. Lewis said: "After I operated on the bones they did not unite with a bony union and have never united." And further: "I did not see anything in the condition of the bones at the fracture, referring to the location of the holes in which the wires had been placed or the manner in which the wires were there,

that would indicate that the operation which had been performed by Doctor Dickson was in any way improperly performed. . . . The condition of pus frequently follows an operation, especially operations upon bone. . . . That is true even with the utmost use of surgical care." And that he certainly expected, in performing the operation and his wiring of the bones, they would make a perfect union, in which, however, he was disappointed, since the result was to secure a ligamentous union only, and that he did not know what caused such condition.

The implied contract on the part of defendant was, not only that he possessed that reasonable degree of learning and skill possessed by others of his profession, but that he would use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he was employed (*Bonnet v. Foote*, 47 Colo. 282, [28 L. R. A. (N. S.) 136, 107 Pac. 252]), and if he possessed such reasonable degree of learning, and in the treatment of plaintiff's injury exercised ordinary care and skill in applying it, he is not liable for results that followed. (*Wurdemann v. Barnes*, 92 Wis. 206, [66 N. W. 111]; *Sims v. Parker*, 41 Ill. App. 284; *Staloch v. Holm*, 100 Minn. 276, [9 L. R. A. (N. S.) 712, 111 N. W. 264].) In the absence of evidence to the contrary, the law will presume the exercise of a reasonable degree of care and skill. (*State v. Housekeeper*, 70 Md. 162, [14 Am. St. Rep. 340, 2 L. R. A. 587, 16 Atl. 382].) "No presumption of the absence of proper skill and attention arises from the mere fact that the patient does not recover." (*Haire v. Reese*, 7 Phila. (Pa.) 138.) "A physician is not a warrantor of cures." (*Ewing v. Goode*, 78 Fed. 442.) In *McGraw v. Kerr*, 23 Colo. App. 163, [128 Pac. 873], it is said: "Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done." Quoting again from *McGraw v. Kerr*, *supra*: "The authorities are practically uniform in holding, . . . that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony." Whether or not plaintiff's elbow was dislocated at the time when he first called upon defendant is not disclosed; indeed, there is no evidence as to when the dislocation occurred, or as to what caused it.

It is a subject purely for conjecture. While one witness states that a blow upon the arm, if of sufficient force and in the right direction, might dislocate it, there is no evidence that such blow was given or that the dislocation was caused by the kick of the horse which broke the bone of the arm. Indeed, from aught that appears to the contrary, the dislocation might have been caused by the enfeebled condition of the muscles and ligaments following continued nonuse of the arm and the carrying of it bandaged and in splints. But assuming that it was dislocated at the time when defendant undertook the treatment of the fractured bone, or that it occurred thereafter during the treatment, such fact alone does not show that defendant was lacking in ordinary care and skill in not discovering such condition. No evidence whatever was offered on the part of plaintiff showing that, if it did exist at such time, defendant was negligent in his failure to make such discovery. So far as appears, he was called upon to set the fractured bones. No intimation was given him of any injury to the elbow. Whether or not defendant should, under the circumstances, in the exercise of ordinary and reasonable care and skill, have discovered such condition, assuming it to have existed, was a question for expert testimony, and none was offered. Conceding that Dr. Rowley, as stated by him, had no difficulty on March 29th in discovering the dislocation, nevertheless this fact does not show a want of ordinary care and skill on the part of Dr. Dickson in failing to discover it, since Dr. Rowley, by reason of superior learning and advantages, may have been a man possessing far more than ordinary skill in his profession. In *James v. Crockett*, 34 N. B. 540, it is said: "A surgeon does not undertake to perform a cure, nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes a fair, reasonable, and competent degree of skill, and in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to a want of a proper degree of skill and care in the defendant or not." To the same effect is *Spain v. Burch*, 169 Mo. App. 94, [154 S. W. 172].

The evidence wholly fails to show any lack of care and skill on the part of defendant in setting and treating the fractured bone of plaintiff's arm, and likewise fails to show when the

dislocation of the elbow occurred, or that a physician, in the exercise of ordinary care and skill in treating plaintiff, should, under the circumstances shown, have discovered the dislocation and treated the same.

The judgment and the order denying defendant's motion for a new trial are reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1417. Third Appellate District.—January 7, 1916.]

**ANNIE BLOXHAM, Respondent, v. TEHAMA COUNTY
TELEPHONE COMPANY, Appellant.**

**NEGLIGENCE—DEATH OF TELEPHONE LINEMAN—CONTACT WITH POWER
LINE—SUFFICIENCY OF EVIDENCE.**—In this action to recover damages for the death of the minor son of plaintiff while in the employ of the defendant in the capacity of a general telephone lineman, which death occurred while he was engaged in fastening a bracket of the defendant upon one of its poles for the purpose of stringing and making fast to such bracket a wire, and as the result of his coming in contact with an electric power wire of another company which was alleged to have been strung less than four feet from where the bracket was being attached, it is held that there was sufficient evidence to justify the jury in finding that the defendant was culpably negligent in directing the deceased to work in a place known to the defendant to be dangerous, without specially warning him of the danger and providing for his protection.

Id.—STATUTE REGULATING ELECTRIC WIRES—VIOLATION BY DEFENDANT—CONCLUSIVE PRESUMPTION AGAINST CONTRIBUTORY NEGLIGENCE—PROPER INSTRUCTION.—An instruction that if the jury found that the defendant was, in the erecting and constructing of the telephone line upon which the deceased was working at the time of his death, violating the act of April 12, 1911 (Stats. 1911, p. 1037), which prohibits the erection and maintenance above ground of any wire or cable conveying or carrying less than six hundred volts of electricity within a distance of four feet from any wire or cable which shall conduct or carry at any one time more than six hundred volts of electricity, and that if they further found that such violation of such statute contributed to the death of deceased, the law conclusively presumes that said deceased was not guilty of contributory negligence, is not erroneous.

ID.—CONSTITUTIONAL LAW—ACT REGULATING ERECTION OF POWER LINES.

The act of April 22, 1911 (Stats. 1911, p. 1037), regulating the placing, erection, use, and maintenance of electric poles, wires, cables, and appliances, and providing the punishment for the violation thereof, applies to a single class of individuals or objects, and is not unconstitutional as class legislation.

ID.—EVIDENCE—SAGGING OF POWER LINE—PROOF PROPERLY EXCLUDED.

In such an action it is not error to refuse evidence and instructions offered to shift the responsibility for the accident upon the power company in causing its line to sag, thus bringing it within the forbidden line of clearance, where it is shown that the power line was first erected.

ID.—PLEADING—PARTIES—APPEAL—WAIVER.—Upon an appeal from an order denying a new trial, in such action, the objection that the action should have been brought by the husband of the plaintiff cannot be considered, where the cause was tried on the pleadings as they stood without objection to the evidence in support thereof.

ID.—APPEAL—ORDER DENYING NEW TRIAL—WHAT REVIEWABLE.—The sufficiency of the pleadings to support the judgment, or the sufficiency of the findings of fact to sustain the conclusions of law, cannot be considered on an appeal from an order denying a new trial.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

H. P. Andrews, for Appellant.

J. T. Matlock, Jr., and Frank Freeman, for Respondent.

CHIPMAN, P. J.—Plaintiff seeks to recover damages for the death of Oscar Cole, her minor son, who, it is alleged in her complaint, lost his life through defendant's negligence while in its employment. The cause was tried by the court with a jury and plaintiff had a verdict for \$2,157.25, on which judgment was accordingly entered. Defendant moved for a new trial, which was denied, and it appeals from the order.

It is alleged in the complaint that at the time of his death the said Oscar Cole was of the age of eighteen years; that his father was John N. Cole, who deserted plaintiff, his then wife, more than ten years ago, and that she obtained an absolute

divorce from him. It elsewhere appears that plaintiff subsequently married one Zell Bloxham, who was living with her as her husband when the accident occurred, but that they were separated when the action was commenced and tried.

The circumstances attending the accident are thus alleged: "That on or about the twentieth day of November, 1911, and at the time of the death of the said Oscar Cole, he was an employee and in the employ of the Tehama County Telephone Company, in the capacity of a general telephone lineman, and at the time of his said alleged death the said Oscar Cole was engaged in fastening a bracket of the defendant company upon one of its poles for the purpose of stringing and making fast to said bracket, a wire of the said company, and that while so engaged in fastening said bracket to said pole, without any fault on his part, he came in contact with one of the electric power wires of the Sacramento Valley Power Company, a corporation, thereby causing his death, and that at the time that the said Oscar Cole was fastening the said bracket to the said pole of the said company, the distance from where said bracket was being attached by the said Oscar Cole, to the electric power wire of the Sacramento Valley Power Company, was less than four feet, and that said wire of the Sacramento Valley Power Company, at said time, was carrying more than six hundred volts of electricity, and that the said wire that was to be placed on said bracket was a wire that would carry less than six hundred volts of electricity."

It is further alleged that deceased "was uneducated and inexperienced in electricity and in building and construction work and duties of a general telephone lineman," and that defendant's agents "who were in charge of said work of construction in fastening brackets and attaching the wires thereon were uneducated and inexperienced" in the work being done, and were careless and negligent in permitting said Cole to erect its line within a distance of four feet from the electric power line of said power company and in permitting incompetent men to take charge of its construction work; that by reason of said alleged carelessness and negligence of defendant the said Cole met his death.

Defendant demurred generally to the complaint and specifically on the ground of uncertainty and "misjoinder of parties in that John N. Cole, father of said Oscar Cole, is not joined

as a party plaintiff in said action." The demurrer was overruled and defendant answered: Denied the alleged dependency of plaintiff upon said Oscar Cole; alleged that plaintiff was a married woman whose husband "was at the time of the accident and is now charged with the support of said plaintiff"; denied that Oscar Cole was, prior to his death, contributing to the support of plaintiff; denied that he was not at fault at the time of his death; denied that he was inexperienced in the work he was doing, and denied also the alleged incompetency of defendant's said agents; denied that defendant, by its alleged negligence or otherwise, contributed to the death of deceased; alleged that he fully understood the work of lineman and understood the dangers attached to such employment; that full and complete instructions were given him as to said work and as to the dangers incident thereto, and especially that he must not place brackets or construct lines within four feet of the electric power line of said Sacramento Valley Power Company; that his death was caused by his own gross carelessness which contributed proximately thereto.

It was admitted at the trial that Oscar Cole was killed on November 20, 1911, while in the employ of defendant and while ascending one of the poles of defendant preparatory to fastening a bracket thereon, by coming in contact with one of the electric power wires of the Sacramento Valley Power Company, at the town of Corning, Tehama County, and that at the time of his death he was of the age of 18 years; that defendant is the owner and managing, constructing, and operating the telephone system involved in the action; that Oscar Cole was the son of John N. Cole and Annie Bloxham, formerly Annie Cole, plaintiff in the action, and that he deserted his family, then consisting of Claudia Cole, Oscar Cole, and Elmer Cole, more than ten years ago, and plaintiff obtained an absolute divorce from said John N. Cole on the ground of willful desertion, "and for that reason the plaintiff brings this action in the place and stead of the said John N. Cole"; that the power wire of the Sacramento Valley Power Company with which the deceased, Oscar Cole, came in contact at the time of his death was carrying more than six hundred volts of electricity, and that the telephone line at that time being constructed by defendant, upon which said Oscar Cole was working, was a wire that would carry less than six hun-

dred volts of electricity; that one Wesley Holt, spoken of as Red Lewis, was defendant's foreman of the crew and "as such foreman controlled and directed the services of said Cole at the time of the accident."

Plaintiff testified that she was married to Zell Bloxham eleven years ago; that he was a blacksmith earning about \$15 per week and supported her "with what he made and what Oscar made," and that the latter "contributed from twenty dollars to thirty dollars per month"; that her husband "is not now living with" plaintiff and they are separated; that deceased did all kinds of work—drove team, worked in hay fields and orchards; "that Oscar never had any experience in the duties of a telephone lineman or electricity to amount to anything; that he had not worked at that more than two months; that he received \$2.50 per day; that he never attended a school where he was taught electricity."

Witness McGovern qualified as an expert in construction work on telephone and electric power lines, having, as he testified, worked at that business since 1898—"practically doing nothing else." He testified that he had known deceased "for a year around town"; that he worked for witness one or two days. He was asked if he knew whether or not deceased had any experience in electrical construction work and answered: "I know he had not. I know that he had no experience"; that he worked for witness "just a few months before his death," and that he afterward worked for defendant. He was not present when the accident occurred. He visited the scene a year later, and the situation and circumstances attending the death of deceased were explained to him substantially as shown by the evidence of witnesses then present. He was asked if a person was sent up on the pole to fasten brackets on it where they are now, how near to the power wire would it be safe for him to place himself. Over defendant's objection he testified that if the man wasn't capable, he "should judge about four feet. Q. You say a man would have to be away four feet? A. No, sir; if the man was a practical man he would go up and put on the brackets if the wire was within six inches, if he knew how to handle himself. . . . If he had a four feet clearance it wouldn't be dangerous. . . . Q. Well, suppose there was about an eighteen or nineteen inch clearance, what would you say then? A. If he wasn't a practical man it would be

a dangerous place for him to work. Q. What would you say about sending a man like Oscar Cole up there? A. I wouldn't send him up there because I don't think he was competent to do it. Because he had no experience."

Witness George Duncan was one of the men working with deceased. He testified that they had been on the job about one week or ten days running a line from Red Bluff to Orland and had reached Corning, where the accident occurred. He was an eye-witness to the accident, and described it as follows: "We were working on the second street south from the Maywood Hotel, either the second or third on the lower end of the town toward the railroad track. He went up to put some brackets for the telephone line and he went up there and put his leg over the messenger wire which was grounded and put his belt around the pole and leaned back to snap the belt to the pole, and when he leaned back he leaned right against the power wire which was behind him. I think it was Sacramento Valley Power Company's power wire. Think he was about twenty-five feet from the ground. He went up the pole to put some brackets on, which he was to put above the messenger wire. Wesley Holt told him to go up there. I had just finished nailing on some brackets on the pole I was on. The pole I was on was across the street from the one Cole was on, west and north of him. When I had nailed my brackets on I stayed there under the pole in position to sight him with his bracket under the power line. I was directed to do this by Holt. He ordered me to sight him in to clear this power wire. It was the one on which Cole was killed. I had orders to sight there nearly on the level or get the brackets in line to clear this power wire between the poles that the lines wouldn't come in contact with each other. I don't think the power wire was more than eighteen inches from the pole where he was to nail the brackets. I didn't measure it, I just guessed at the distance. When I was sighted I told Cole there wasn't clearance enough. He said there was. I don't remember having any instructions as to the distance the telephone wire was to clear the power wire. I didn't hear any instructions given Cole on that point, but I heard Holt instruct Cole to be careful about the power. That is as much as I can remember at the present time. Before that I hadn't had but very little experience in power, scarcely any. I had considerable experi-

ence in telephone work. I had been working at telephones off and on since 1906, but had not had scarcely any experience with power wires. I don't know how much experience the other men working with me had. When Cole struck the power line he fell limp out over the wire. I hollered to the other boys as soon as I saw it; they started to run down there and then they went back the other way to the substation and shut the power off. I don't believe it was eighteen inches from the messenger wire to the power wire." The witness was asked how a man who understood his business should proceed in what deceased was doing. "A. Well, he should have stopped and buckled on before he got up to this messenger. He should have buckled on the safety belt around the pole and put himself in position to work. Touching the wire (the power wire) caused Cole's death." On cross-examination he testified: "Q. Mr. Duncan, Mr. Holt had directed you to see that there was sufficient clearance before nailing on the brackets, had he not? A. Well, he didn't specify just that manner. He asked me to sight through there and sight under the power. To sight young Cole under the power was the orders he gave me. This was for the purpose of giving sufficient clearance. Our instructions were to go up there and put the brackets on and my instruction was to sight him in for this clearance. I did sight for clearance and told Cole that there wasn't sufficient clearance." On re-examination he testified: "I was instructed to clear this power and this messenger. That was as much as I know of it. I wasn't specified any particular distance that I was sighting for placing a bracket on which a telephone wire would be placed. It couldn't have been placed anywhere on that pole and had perfect clearance from the power wire." On re-cross he testified: "I was there after the death of Cole until the body was removed and it had been taken to the morgue. Later in the day there was considerable more clearance between the messenger wire and the power company's wire. Later on that day, it was about twenty minutes after the accident, the slack was straightened out of the Sacramento Power wire. It was done by a Sacramento Valley wire man. He drew up the slack immediately after the accident, and after he drew it up there was plenty of space for a man to work but wasn't four feet, but there was considerable difference in space. . . . There were no brackets nailed on the

pole on which Cole was killed that day." The witness testified that about ten days later he saw the pole, "and the brackets and wires were strung on it"; that the messenger wire, "just guessing at it, it was somewhere in the neighborhood of four feet, but whether over or under" he could not say; "the telephone wire was about fourteen or sixteen inches above the messenger."

Witness Charles Bertholas, foreman of the Northern California Power Company, formerly worked for the Sacramento Valley Power Company and had its lines constructed where Cole was killed. He testified that the wires are higher today than when he left Corning. The place where Cole was working when he was killed was pointed out to him and he testified that it would be a dangerous place to send a man with "two months' experience in telephone work." He testified that the power line wire carried seven thousand two hundred volts.

Witness Robert Stewart, "engaged as an electrician by the North California Power Company," who "had worked for the Pacific Gas in construction work for six years," testified that he knew Oscar Cole by sight during his lifetime and knew where he was killed; that he saw him while he was on the pole, dead; that the messenger wire of the telephone company was about three feet from the power wire at the time Cole was killed. "Q. Well, how far was the brackets—if those brackets were on that pole at the time Cole was killed, at the same place they are now, how far would they have been then from the power wire?" Objected to on the ground that "the evidence shows that there were no brackets on there at the time Cole was killed." Objection overruled. "A. About eighteen inches." He testified "that there was no place above the messenger wire four feet from the power wire and it didn't make any difference where a man would nail if it was above the messenger, it would be within the four-foot limit." He testified that where Cole was working was a dangerous place for a man of only two or three months' experience. He also testified that "the distance between the wires on the poles at this time are the same that they were then."

Witness Melvin Kingsley was local manager of defendant company in November, 1911; "that he saw Cole at the telephone pole after his death; that he saw him taken down;

that witness had the two brackets that are now on the telephone pole nailed there a day or two after Cole's death and the wires were strung on"; that he was directed by Manager Reeves to nail them on; that he received no instruction as to the distance the wires should be from the power wire and he did not measure the distance and does not know whether they were four feet apart or not.

Witness De la Montanya, for defendant, was one of the crew working with deceased. He helped take deceased down from the pole but did not witness the accident. He testified that he "heard foreman Holt give instructions to be careful as to the danger of the power lines several times; I heard him give instructions to that effect to Cole the day before the accident happened; this was in reference to the high voltage power lines in Corning." He testified that he did not measure the distance between the high voltage power line and the cable of the telephone company, but he believed there was room enough for Cole to work safely; his estimate of the distance was three feet; his theory of the accident was that "when he buckled the belt he threw his hand around with the snap and then is when I think he came in contact with the wire with his thumb"; he said there was a slack in the power wire that brought it nearer to the telephone cable and that "right after he was killed the slack was pulled up."

Witness Duncan was called for defendant and testified "that it was Cole's thumb that came in contact with the wire and not the other part of his body; his hand was behind him, along the side of him like; we had not completed the work where Cole was."

Defendant's foreman, Holt, testified that Cole commenced work on the Red Bluff and Orland line November 15, 1911; that he instructed Cole, as he did "all the rest of the boys in the gang, to be very careful while working, particularly in the town of Corning, about coming in contact, or bringing their person in contact with any voltage wires while being in contact with grounded messengers"; that he read the recent law on the subject of placing wires; when Duncan went up his pole I told him to sight and see how the power wires were. Of course, going along in his duties it would be necessary to put brackets on, and Cole went up his pole without my directing him, but he knew it was in his force of duty, as he had been doing from day to day going along. I told

Duncan to sight through for clearance at that point for Cole . . . to see whether they (the power wires) would interfere with us in any form or manner through there"; that at the time of Cole's death witness was four or five poles east of him; that Duncan called him when the accident happened and he went to his assistance; that "he saw the condition of the power wires at the time Cole was taken down from the pole and saw it subsequent to that time on the same day and that the condition had changed; that the wire had in the meantime been cut and pulled up; that he didn't measure the distance but that the distance of clearance was much greater after the slack was pulled up and the clearance was greater than before." There was evidence that according to the survey of the line which Holt was given to work by he found that in several places it would bring the line in contact with the power line and he changed the location upon his own judgment; that at a point south of the place where Cole was killed the company ran its line at a crossing between two power lines not more than five feet apart.

A map or plat showing the location of the poles, wires, etc., immediately at the scene of the accident was introduced but does not appear in the record. It probably made clear to the jury evidence otherwise more or less obscure. The office of the "messenger wire," spoken of by witnesses, is not explained. Whatever its use, it was there as part of the construction work, was connected with the pole on which Cole was working and was "grounded," i. e., became a conductor of electricity brought in contact with it. The brackets, as we understand the evidence, were the wooden fixtures to be nailed to and projecting from the poles and to which the wire was fastened. It is not made clear just where the pole was situated, on which Cole was working, with reference to the power line poles. Judging from the significance given to the slack in that wire, we infer that this pole was midway between the poles carrying the power line wire, and hence the slack or sagging in that wire brought it nearer the pole which Cole ascended. We have, then, from the evidence this situation: Cole was sent to work with directions to nail brackets on a pole at a point above the messenger wire, which latter, witnesses testified, was eighteen or nineteen inches from the power wire; one of defendant's witnesses said it was three feet, while others, not giving exact distance, testified

that at no point above the messenger wire was it possible to place a bracket which would leave a "clearance" between it and the power wire of four feet. The relative position of these various objects was well known to defendant's agents. Expert witnesses, familiar with this sort of work and its risks, testified that, to a person inexperienced or not capable, the place where Cole was sent was dangerous. Cole had no experience in electrical construction and but a short time as telephone lineman, an employment in itself dangerous, and being without experience, the risk necessarily proved fatal to him. He had been instructed, as defendant's witnesses testified, to be careful not to come in contact with a power wire, which may be conceded, and still it would not relieve defendant from the charge of negligence in sending him to work in a place known to defendant to be dangerous without specially warning him of the danger and providing for his protection. This would be true under the general law governing such cases, and particularly so under existing statutes making it a misdemeanor to construct a telephone line, carrying less than six hundred volts of electricity, within four feet of a power or other line carrying more than six hundred volts—in this instance carrying more than seven thousand volts.

Cole seems to have done the thing naturally suggesting itself to one of his experience acting under the orders of his superior. He climbed the pole, threw a leg over the messenger wire, and was fastening his belt to the pole to support himself while nailing on the brackets. In doing so he came in contact with the power line wire, thus forming a circuit with the grounded messenger wire on which he was resting, and was killed. Whether he was guilty of contributory negligence is a question apart from defendant's negligence and will be noticed later. We think there was sufficient evidence to justify the jury in finding that defendant was culpably negligent. We are also of the opinion that had the court not taken from the jury by its instructions the question of Cole's negligence as the proximate cause of his death, now claimed as error by defendant, the circumstances were such as would have justified the jury in finding that defendant failed to establish this defense. The court, however, instructed the jury as follows:

"You are instructed that the statute law of this state makes it unlawful for any commission, officer, agent, or employee

of the state of California, or of any city and county, or city or county, or other political subdivision thereof, or any person, firm, or corporation, to run, place, erect, or maintain above ground, within a distance of four feet from any wire or cable which shall conduct or carry at any one time more than six hundred volts of electricity, any wire or cable conveying or carrying less than six hundred volts of electricity, and that the statute above referred to in this instruction was enacted for the safety of employees, and in this connection I charge you that if you find the Tehama County Telephone Company, at the time of the killing of Oscar Cole, was, in the erecting and constructing of the telephone line upon which Oscar Cole was working at the time of his death, violating such statute law, and you further find from the evidence that such violation of such statute contributed to the death of said Oscar Cole, then, and in that event, the law conclusively presumes that said Oscar Cole was not guilty of contributory negligence, and you must so find."

Defendant challenges the soundness of this instruction on the ground that the statute authorizing it is unconstitutional "as class legislation." The act of April 8, 1911 (Stats. 1911, p. 796), went into effect September 1, 1911. Section 1 reads as follows:

"In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of."

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant."

The act of April 22, 1911 (Stats. 1911, p. 1037), "regulating the placing, erection, use and maintenance of electric poles, wires, cables and appliances, and providing the punishment for the violation thereof," in its first section provided that "No commission, officer, . . . and no other person, firm, or corporation shall . . . (c) Run, place, erect or maintain, above ground, within the distance of four (4) feet from any wire or cable conducting or carrying less than six hundred volts of electricity, any wire or cable which shall conduct or carry at any one time more than six hundred volts of electricity, or run, place, erect or maintain within the distance of four (4) feet from any wire or cable which shall conduct or carry at any one time more than six hundred volts of electricity any wire or cable conducting or carrying less than six hundred volts of electricity." Section 4 provides: "Any violation of any provision of this act shall be deemed to be a misdemeanor, and shall be punishable upon conviction by a fine of not exceeding five hundred dollars (\$500.00) or by imprisonment in a county jail not exceeding six (6) months or by both such fine and imprisonment." This act by its terms went into effect "six months from the date of its passage in so far as it relates to new work." Both acts were, therefore, in effect when Cole was killed.

We do not feel called upon to discuss the constitutionality of these acts. They clearly apply to a single class of individuals or objects, and apply uniformly to all of the class and, we think, fall within the principles enunciated in *Pasadena v. Stimson*, 91 Cal. 238, [27 Pac. 604], and numerous subsequent cases on the subject. See the discussion in the recent case of *City of Sacramento v. Swanston*, ante, p. 212, [155 Pac. 101].

The instruction complained of was not error. If a case may be supposed where the conduct of the injured party was so grossly negligent as to place him beyond the pale of the protection given by the statute, this was no such case. There is no merit in the contention that the statute is intended solely "for the protection of the general public, for the patrons of telephone companies, etc." In our opinion, it was intended to apply to just such a case as we have here, and, under the

uncontradicted facts, the court was justified in instructing the jury that "if you find that the defendant was, in the erecting and constructing of the telephone line upon which Oscar Cole was working at the time of his death, violating such statute law (referred to in the instruction), and you further find from the evidence that such violation of such statute contributed to the death of said Oscar Cole then, and in that event, the law conclusively presumes that said Oscar Cole was not guilty of contributory negligence, and you must so find."

Error is claimed in the court's refusing evidence and instructions which were offered to shift the responsibility for the accident upon the power company in causing its line to sag, thus bringing it within the forbidden limit of clearance. The court was clearly right in its ruling. The power line was erected before defendant's line was started, and defendant knew, or should have known, that at the point involved the power line was dangerously near where defendant was locating its line. The duty of defendant, obviously, was to adapt its line to the situation in which it found the power line, or first causing the power company to take up its slack if that would have removed the danger. In no sense was the power company liable nor could it be made the scapegoat of defendant. It was not error, therefore, for the court to instruct the jury, "That the Sacramento Valley Power Company has nothing to do with this case, and their neglect, if any, is no defense in this action; the defendant here is bound by the conditions existing as found at the time of the accident."

We have given careful attention to alleged errors in ruling upon evidence offered and find none calling for special consideration. Some objections were made to instructions given, not already noticed, and to instructions offered by defendant and refused by the court. The instructions given were full and correctly presented every essential element and issue in the case. We find no error in any given or refused.

Finally, it is urged that the order must be reversed for the reason that the action should have been brought by plaintiff's husband. The argument is that "the character of the property, which consisted of a chose in action, as community property or separate property, is governed solely by the statute"; that it appeared by the answer and by the evidence

that plaintiff is a married woman whose husband was living with her when her son was killed; that the earnings of the son went to support the family—the community; that the loss of this support constituted damages and the damages accruing became community property, not having been acquired by gift, devise, or descent.”

The question cannot be considered on this appeal. The demurrer claimed a misjoinder of parties plaintiff because plaintiff's former husband and the father of the deceased was not made a party. The answer alleged that plaintiff is a married woman and was such at the time of the accident, “and that her husband was at all times mentioned in said complaint fully able and willing to support the said plaintiff and did so support said plaintiff.” No suggestion is made that he should have brought the action. The cause was tried on the pleadings as they stood without objection to the evidence in support thereof. The appeal from the judgment was not taken in time to avail the appellant.

The grounds stated in the motion for a new trial were: 1. Insufficiency of the evidence to justify the verdict; 2. That the verdict is against law; 3. Errors in law occurring at the trial; 4. Excessive damages appearing to have been given under the influence of passion and prejudice.

The sufficiency of the pleadings to support the judgment, or the sufficiency of the findings of fact to sustain the conclusions of law, cannot be considered on an appeal from an order denying a new trial. (*Swift v. Occidental etc. Co.*, 141 Cal. 161, [74 Pac. 700]; *Sharp v. Bowie*, 142 Cal. 462, [76 Pac. 62]; *Hoover v. Wolfe*, 167 Cal. 337, [139 Pac. 794].)

The appellate court is limited in its review of the action of the lower court, on appeal from the order denying a new trial, to the grounds upon which the new trial was asked. (*Wheeler v. Bolton*, 92 Cal. 159, [28 Pac. 558].)

The only ground made the basis of the motion for a new trial having any application to the point now raised is “that the verdict is against law.” In discussing the office of new trial when sought on the ground that the decision is against law, it was pointed out, in *Swift v. Occidental etc. Co.*, 141 Cal. 161, [74 Pac. 700], that where a new trial could afford no relief, and other and effective means of relief are expressly provided in the Code of Civil Procedure (secs. 663 and 663½), the motion for a new trial is necessarily overruled.

An example is thus given: "Where the findings are full and complete as to all the issues and fully sustained by the evidence, but the conclusions of law are erroneous or misapplied in framing the judgment. In such a case," said the court, "it is plain that a new trial—a re-examination in the same court of the issues of fact, or some of them (Code Civ. Proc., sec. 656)—would accomplish nothing, whereas a motion in pursuance of section 663 to vacate or correct the judgment would secure appropriate relief in the trial court, or if relief was denied there, it could be secured by an appeal from the judgment." (Id.) And it was held that a motion for a new trial is not a means of correcting the error in the decision where the only fault in the findings is that they do not support the legal conclusions drawn from them, and still less is it a means of remedying a fault in the pleadings or an error in granting relief not warranted by the pleadings. (Id.)

"A new trial is a re-examination of an issue of fact in the same court after a trial and decision." (Code Civ. Proc., sec. 656.) "The question whether the judgment is authorized by the pleadings or findings cannot be agitated on the motion for a new trial, for it is not involved in a re-examination of the issues of fact. . . . The question whether the issues of fact were correctly found does not depend in any manner on the question whether a pleading states sufficient facts to entitle a party to the relief granted by the judgment or whether the issues as found sustain the judgment." (*Martin v. Matfield*, 49 Cal. 45; *In re Doyle*, 73 Cal. 564, 571, [15 Pac. 125].) It was hence held, in *Brisson v. Brisson*, 90 Cal. 323, [27 Pac. 186], that, upon an appeal from an order denying a new trial, the court "can only review the action of the court below, we cannot consider whether the findings are sufficient to sustain the judgment, and that our examination of the evidence is limited to a consideration of its sufficiency to sustain the findings of fact."

It is not now claimed that the damages awarded were excessive.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1741. First Appellate District.—January 10, 1916.]

BERTHA C. WHYTE, Respondent, v. IDORA PARK CO.
(a Corporation), Appellant.

NEGLIGENCE—PERSONAL INJURIES—PATRON OF CONCESSION IN AMUSEMENT PARK—LIABILITY OF PARK OWNER.—A corporation which conducts an amusement park and makes a charge for admission thereto is liable for personal injuries received by a patron of the park in a concession installed therein by private parties at their own expense and operated by them under contract with the corporation whereby the latter received a percentage of the gross admission fees thereto, notwithstanding the operators and attendants necessary to run the concession were hired and paid by the concessioners, and that the corporation had no control or direction over them, excepting the right reserved to object to any employee who was not conducting the business in a proper way.

ID.—ACTION FOR DAMAGES—DEFECTIVE EXIT DEVICE—SUFFICIENCY OF EVIDENCE.—In this action against an amusement park corporation to recover damages for personal injuries received in a concession, it is held that even if it were the rule that such a corporation is liable to a patron only where the injury is the result of defective construction, or where the device is of a character which in operation is likely to cause injury, the judgment in the action could not be reversed because there is evidence in the record which supports the finding of the court that the slideway which it was necessary to go upon in making the exit from the concession in question and from which the injury occurred was built at such a steep angle and with the bottom thereof so close to a wall of the building which inclosed the contrivance, that one using the slideway was very likely to be injured.

ID.—ASSUMPTION OF RISK—QUESTION FOR JURY.—It is also held that under the pleadings and evidence it was for the jury to determine as to whether there was an assumption of risk on the part of the plaintiff, and that the finding thereon must be upheld.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Denson, Cooley & Denson, and George Martinson, for Appellant.

Samuel M. Shortridge, and Carroll Cook, for Respondent.

KERRIGAN, J.—This is an action for damages for personal injuries in which judgment went for the plaintiff, and from which judgment and an order denying defendant's motion for a new trial this appeal is prosecuted.

The facts out of which the action arose are briefly the following: On the fifteenth day of May, 1910, the plaintiff and six friends went for a day's outing to Idora Park, a place of amusement conducted by the defendant in Oakland and to which a charge for admission was made. Within the inclosed park there were various devices and attractions for the amusement of visitors. Among these was a structure known as the "Joy Laundry." This had been installed by Charles Hoffman and A. E. Drake at their expense and with the consent of the defendant, and was operated under a verbal contract between said Hoffman and Drake and the defendant, whereby the concessioners agreed to pay to the defendant forty per cent of the gross receipts for the year 1910. So far as necessary to be noted here the operators and attendants necessary to run the device were hired and paid by Hoffman and Drake, and, with the exception that the defendant reserved the right to object to any employee of the concessioners "who was not conducting the business in a proper way," such employees were under the control and direction of the concessioners. On the mentioned day the plaintiff, having paid the general entrance fee to the park, and a further charge for admittance to the "Joy Laundry," with her companions passed into and through the same to the exit, where they were required to go upon and slide down a slideway or chute. Upon plaintiff objecting to this means of leaving the building she was assured by an attendant in charge that this was the only way out, that there was no danger, and that he was stationed there to catch her. Upon this assurance she got upon the chute and slid down rapidly. The attendant making no effort to catch her, she was precipitated against a closed door facing the bottom of the slide, and received the injuries set forth in the complaint. The record also contains evidence which tends to show that, from the standpoint of safety the slideway was maintained at too steep an angle of descent, and that the doorway in question was situated too close to the bottom of the chute.

In support of its appeal it is the claim of the defendant that the concessioners Hoffman and Drake were independent

contractors, that the accident was caused through the negligence of their employee—the attendant who failed to arrest the speed of the plaintiff as she neared the bottom of the slide—and that consequently the defendant is not responsible for the injuries sustained by her.

There are some cases which support this theory advanced by the appellant, but we think the weight of authority sustains the proposition that one conducting a place of amusement will not be relieved from liability for injury to a patron merely because it was caused by the negligence of a concessioner or his employee. In the case of *Stickel v. Riverside Sharpshooters Park Co.*, 250 Ill. 452, [34 L. R. A. (N. S.) 659, 95 N. E. 446], where the facts are strikingly similar to those in this case, the appellant contended, as here, that its only duty with reference to the building in which the injury occurred was to use ordinary care to keep the structures and devices operated by the concessioners in a reasonably safe condition for the purposes for which they were constructed, and that it could not be held liable for the negligence of its concessioners or their employees in operating the structures and devices. The court, after making a reference to cases where the owner of premises turned them over to an independent contractor, who had the sole right to hire and discharge servants, and in which cases the doctrine of *respondere superior* does not apply to the owner, says: "But in amusement places where space is granted for conducting attractions for the amusement of the public, and for which an admission fee is charged by the concessioner and divided with the owner, there is unanimity of authority that the owner assumes an obligation that the devices and attractions operated by the concessioners are reasonably safe for the purposes for which the public is invited to use them. While there are some decisions to the contrary, the greater weight of authority is that the owner will not be relieved from responsibility because the exhibition is provided and conducted by the concessioner, provided it is of a character that would probably cause injury unless due precautions are taken to guard against it; and his duty applies not to construction alone, but to management and operation where the device is of a character likely to produce injury unless due care is observed in its operation."

In the case of *Wodnik v. Luna Park Amusement Co.*, 69 Wash. 638, [42 L. R. A. (N. S.) 1070, 125 Pac. 941], the head of a mallet used in operating a striking machine in an amusement park flew off while being used by a patron, resulting in his injury; and it was held that where an individual or corporation operated an amusement park open to the public on the payment of an admission fee, the fact that such person or corporation let space on the grounds to another to operate a striking machine, in consideration of receiving part of the gross receipts of the concessioner, the lessor was not relieved of liability for injury caused by a defect in the mallet used in operating the machine.

In the case of *Thornton v. Maine State Agricultural Society*, 97 Me. 108, [94 Am. St. Rep. 488, 53 Atl. 979], it is held that an association conducting a fair is liable for injury through a defect in apparatus employed by a concessioner for the amusement of patrons when it receives a portion of the sums paid for the use of the apparatus, has general charge of the grounds, and takes an active part in advertising the amusements. In the course of the opinion the court said: "Some of these cases cited are those where the injuries resulted from the negligence of the independent contractors and not lessees. But we can perceive no tenable distinction in a case like this. In either case the offending thing is where it is by the license and permission of the owners of the premises, and upon ground which the owners, by virtue of their invitation to the public, hold out as safe. This is the ground of their liability. By inviting patrons to their fair, they make themselves bound to use reasonable care to see that the fair in all its parts is safe, and is conducted safely, whether the various parts of the fair are conducted and managed by the owners themselves, or, with their permission, by licensees, independent contractors, or lessees. Such is the conclusion which rests upon good sense, and which seems to be clearly established by all the authorities upon the subject."

In *Texas State Fair v. Brittain*, 118 Fed. 713, [56 C. C. A. 499], and in *Texas State Fair v. Marti*, 30 Tex. Civ. App. 132, [69 S. W. 432], a street fair association which by contract gave the exclusive use of a portion of its grounds to an exhibitor, and advertised such exhibit as one of the attractions of the fair, was held liable for injuries to a spectator caused by the falling of seats negligently constructed by the

exhibitor. (See, also, *Graffam v. Saco Grange etc. Husbandry*, 112 Me. 508, [L. R. A. 1915C, 632, 92 Atl. 649]; *Sebeck v. Plattdeutsche etc. Verein*, 64 N. J. L. 624, [81 Am. St. Rep. 512, 50 L. R. A. 199, 46 Atl. 631].)

Defendant further contends that under the authorities on which plaintiff relies, and to some of which reference has just been made, that an amusement company in cases like the present is liable to a patron not for the negligence of a concessioner or his employees, but only where the injury is the result of defective construction, or where the device is of a character which in operation is likely to cause injury. But even if this were so, the judgment here could not be reversed, because there is evidence in the record which supports a finding of the court that the slideway was built at such a steep angle, and with the bottom thereof so close to a wall of the building which inclosed the contrivance, that one using the slideway was very likely to be injured. Or, if it can be said from the evidence and findings that the accident was due partly to defective construction, and partly to negligent operation, we still cannot interfere with the conclusion of the judgment.

On the point as to whether there was an assumption of risk on the part of the plaintiff, we think under the pleadings and evidence in the case this was a question of fact for the trial court, and the finding of the court upon that issue must be upheld. (*Zibbell v. Southern Pac. Co.*, 160 Cal. 237, [116 Pac. 513]; *Johnson v. Southern Pac. Co.*, 154 Cal. 285, [97 Pac. 520]; *Seller v. Market St. Ry. Co.*, 139 Cal. 268, [72 Pac. 1006]; *Waniorek v. United Railroads*, 17 Cal. App. 121, [118 Pac. 947]; *Canon v. Chicago etc. Ry. Co.*, 101 Iowa, 613, [70 N. W. 755]; *Haley v. Case*, 142 Mass. 316, [7 N. E. 877]; *Keegan v. Kavanaugh*, 62 Mo. 231].)

It is also clear that the allegations of the complaint support the findings of the court.

Counsel for the appellant in his oral argument raised the point that there is an error in the amount of the judgment arising from a mistake in computation. We think that this point is without merit, for it does not appear, as suggested by counsel, that the sum of three thousand seven hundred dollars included in the judgment was arrived at as the result of a calculation of plaintiff's loss of time. The finding of the court is "that by reason of the injuries to the plaintiff she has

been damaged in the sum of three thousand seven hundred dollars; that the plaintiff has also sustained loss and been damaged in the sum of eight hundred dollars, as alleged in paragraph VIII of the complaint. . . . ” It is paragraph VIII that charges damage to plaintiff through loss of time from her customary labor, and the amount thereof is found in accordance with her claim.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 9, 1916.

[Civ. No. 1424. Third Appellate District.—January 10, 1916.]

GRENFELL LUMBER COMPANY (a Corporation), Respondent, v. JAMES F. PECK, Appellant.

MECHANIC'S LIEN—ACTION FOR FORECLOSURE—PURCHASE BY AGENT OF DEFENDANT—SUFFICIENCY OF EVIDENCE.—In this action for the foreclosure of a lien for materials furnished by the plaintiff for use in the construction of a barn on real property owned by the defendant, the court was warranted in finding that the son of the defendant, in the transaction with the plaintiff, was acting for and as the agent, either actual or ostensible, of the defendant.

APPEAL from a judgment of the Superior Court of Colusa County. H. M. Albery, Judge.

The facts are stated in the opinion of the court.

Henry C. McPike, Ernest Weyand, and Frank R. Wehe, for Appellant.

Thomas Rutledge, and Alva A. King, for Respondent.

HART, J.—The court below rendered and caused to be entered judgment foreclosing a materialman's lien on the real property described in the complaint for the sum of

\$445.05 for materials furnished by the plaintiff for use in the construction of a barn on said real property, which property was owned by the defendant.

This appeal is by the defendant from said judgment and is supported by a bill of exceptions.

The general point urged against the judgment is that the findings upon which it is predicated are not supported by the evidence.

The theory upon which the plaintiff originally drafted its complaint was that it was entitled to the benefit of the lien provided for by section 1183 of the Code of Civil Procedure, which, among other things, provides that mechanics, materialmen, etc., and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, etc., shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done or materials furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as a contractor or otherwise. Upon the day set for the trial of the cause, and upon the opening thereof, counsel for the plaintiff asked and was granted leave by the court to amend the complaint by adding thereto the following: "That said defendant, James F. Peck, had and obtained knowledge of the construction of said barn on said premises at the time the construction of the same was commenced." This amendment is based upon section 1192 of the Code of Civil Procedure, which provides that where there is constructed any of the buildings mentioned in section 1183, *supra*, upon any lands with the knowledge of the owner of such lands, or of the person having or claiming any interest therein, such building shall be held to have been constructed and the labor performed thereon and the materials used therein furnished at the instance of such owner or person having or claiming any interest therein, "and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming any interest therein shall, within ten days after he shall obtain knowledge of the construction, alteration, repair, or work or labor, give notice that he will not be responsible for the same, by post-

ing a notice in writing to that effect, in some conspicuous place upon the said land . . . or upon the building or other improvements situated thereon. . . . ”

The point is made that by the amendment thus allowed a new cause of action was stated and that said new cause is barred by the terms of section 1190 of the Code of Civil Procedure. But, whether this be true or not—whether, in other words, a resort to or the pleading of another and different lien from that originally relied upon would amount, strictly speaking, to the introduction of a *new* cause of action, where the ultimate object of the action in either case is precisely the same or for precisely the same relief as to the same transaction, it is certainly true that the provisions of said section 1190 affect the remedial rights of lien claimants. The point is an important one, but we do not feel compelled to consider and decide it here. There is no claim, nor can there be, that the cause of action stated in the complaint as it was originally drafted and filed was changed by the amendment. The complaint, therefore, states a cause of action for the lien authorized by section 1183 of the Code of Civil Procedure, and we have been persuaded, after a careful examination of the record, that the judgment is supported by the findings as to the lien authorized by said section. And, in the outset, we may further say that we are of the opinion that the findings so referred to derive sufficient support from the proofs.

The court, among other facts, found that “between the thirty-first day of October, 1911, and the twelfth day of January, 1912, inclusive, the plaintiff furnished to the defendant, on the order of C. M. Peck, and at his special instance and request, and said C. M. Peck bought all that certain lumber, all for the use and benefit of said defendant, of the total value of \$445.05, as hereinafter set out. That the said C. M. Peck was then and there and for a long time prior thereto, the duly authorized and acting agent of said defendant, and said lumber was so bought and ordered by said C. M. Peck, acting for and as the agent for and in behalf of said defendant, James F. Peck, . . . and that said lumber was so furnished by said plaintiff to defendant to be used, and the same was actually used by him in the erection of a structure, to wit, a barn upon a certain tract of land, then and now owned by him,” describing said land.

These facts were admitted at the trial: That C. M. Peck, a son of the defendant, in the year 1909, purchased the land described in the complaint and upon which the barn in question was erected; that, although the money paid by C. M. Peck for the land was furnished by the defendant, who resided in the city of San Francisco, the former took the title deed in his own name; that the defendant was the real owner of the land and C. M. Peck held title thereto as trustee for the benefit of the defendant; that C. M. Peck, after purchasing the land, managed and personally controlled it and all the business connected therewith; that C. M. Peck left Colusa in the month of November, 1910, and in the month of August, 1911, went to Lexington, Virginia, to attend a law school; that one M. V. Santos became a tenant of the land by virtue of the terms of a certain lease, and that thereafter and on the tenth day of February, 1910, C. M. Peck conveyed the premises to the defendant by deed duly recorded in the office of the county recorder of Colusa County on the date of its execution. It was further admitted that C. M. Peck had, previously to the transaction from which this controversy arises, purchased lumber from the plaintiff and paid for the same by means of a draft drawn by him upon the defendant. It was also admitted that all the lumber or materials furnished for the ranch or land described in the complaint while the same was standing in the name of C. M. Peck, and subsequently, was paid for by the defendant; that the lumber or material referred to in the complaint and described in the lien filed by the plaintiff was actually used in the erection of the barn on the land described in the complaint.

As to the controverted facts, Le Roy Grenfell, secretary of the plaintiff corporation, testified: "Between the year 1909 and the selling of the lumber referred to in the complaint, C. M. Peck had come to the yard and brought parties with him, and gave me verbal orders, and also to men in the yard. I had an oral order at all times. One bill was sent to C. M. Peck in the east, and he sent me a draft on defendant. . . . I know Santos. He has been residing on this land. Mr. C. M. Peck brought Santos into the office and instructed me to deliver lumber to Santos for the ranch at any time he should call for it. The first bill was paid for—the last has not yet been paid for. The first bill was paid by a draft

on the defendant. In connection with this last bill, I delivered the lumber referred to in the complaint to Mr. Santos. The lumber was delivered on the orders, as in all previous cases, orders received from C. M. Peck. All lumber ordered by Mr. Santos was delivered to Mr. Santos on C. M. Peck's orders. Mr. C. M. Peck visited the office and left these orders there—to deliver to Mr. Santos at any time that he called for lumber, and charge it to the ranch account. That was the final orders. . . . During this time Mr. Santos was in possession of the premises as tenant. Santos was present with C. M. Peck when directions were given to deliver the lumber to Santos. . . . Mr. Peck did not say anything as to how this lumber would be paid for, or who would pay for it. I presumed it would be treated as previous bills. . . . All bills were charged to 'C. M. Peck, ranch account.' C. M. Peck had some other accounts there, but this particular lumber was to be charged to the ranch account. At that time I had learned and knew of the transfer of the ranch from C. M. Peck to the defendant. Had no conversation with C. M. Peck in regard to that matter. There was a bill paid by James F. Peck after the ranch was transferred. Mr. C. M. Peck was personally in charge of the ranch at that time (the time the orders above mentioned were given). I had very little to do with James F. Peck. I met him once. . . . At the time these orders were given, C. M. Peck was residing in Colusa, but this lumber was not furnished until after C. M. Peck had left here for the east, but it was furnished upon the order that he had given before he left for the east. Q. Now, was there any change in the control or management of the ranch that you know of, actually, subsequent to the time C. M. Peck made his deed to James F. Peck? A. There was not. When Santos came for the lumber, he stated that it was to build a barn on the ranch. He visited the office, gave me the size of the barn, and wanted to know what it would cost. I figured it up for him, and gave him the figures; also wrote a letter to defendant, which Santos signed, and Santos received the answer. I did not." The letter written by the witness and addressed to the defendant at San Francisco read as follows: "Mr. Santos wishes to explain the following regarding a barn on the ranch." Here follows a description of the barn proposed to be erected—the dimensions, kind of roof, and cost of the material neces-

sary to its construction. The letter then continued: "He would like to hear from you by early mail if you will allow him the barn, as he has considerable hay out and would like to commence building the barn at once, to get the hay in before it rains." (Here it may parenthetically be explained that it was shown by the testimony of Santos that the defendant, in reply to a letter previously written by the former to the latter, addressed the following letter to Santos, the same being dated at San Francisco, September 25, 1911, and to which the letter above quoted was an answer: "Yours of the 23d received. Before my son went east he said something about building a barn. I think he said he was to purchase the material and you were to build the barn. Please write me what the material would cost, and I will see what can be done. If you write as soon as you receive this, I will get it next Saturday.")

The witness, Grenfell, continuing, testified: "After I had written this letter [the one first above quoted] Santos came to the lumber company and got the lumber for this barn."

A. H. Walworth, yard manager or foreman of the plaintiff when the transactions involved here were had, testified: "I remember that C. M. Peck and Santos were in the yard of the lumber company when they discussed the question of furnishing lumber to M. V. Santos. Santos drove up there after some lumber and while Mr. Grenfell came out with the order to me, Mr. Peck came along and said: 'Let Mr. Santos have anything he wants and charge it to the ranch.' That was in 1911 or 1910, I don't just remember. Santos got lumber to put up a barn out there. Prior to that time a great many posts and fence lumber of various kinds. I remember the circumstance of Santos coming to the lumber-yard for lumber for the barn. When he first started Santos hauled out a few loads and then Mr. Green hauled out the bulk, and a while afterward Mr. Santos came back and hauled several more loads."

Santos, testifying for the plaintiff, said that Mr. C. M. Peck told Mr. Grenfell, "Let him have the posts and lumber for the place." He further said that Mr. C. M. Peck did not "say anything to Mr. Grenfell about getting any other lumber." It appears that Santos received a letter from C. M. Peck, dated at Lexington, Virginia, October 24, 1911, which read as follows: "In regard to the lumber, I wish to state

that I have bought it, and also all the iron that is in the little shed in front of the house where the lumber is. Now, I want you to haul it at once, and get it all down there on the ranch, or the mound before the high water comes. Don't neglect this at all. You can then build the barn as we agreed. I will furnish the nails for the same. Now, don't put this off one day, but get at it, and get the barn up before the winter sets in. I shall insist that you attend to this feature at once, as it is getting late." Here it should be explained that the lumber and iron which C. M. Peck, in the foregoing letter spoke of having bought, were from an old warehouse, which had stood on other land of which said Peck had once been in control for a corporation, and which had been destroyed for practical uses by the force of winter storms and floods.

Santos, continuing his testimony, said: "I remember the building of a barn down there. I got the lumber just spoken of [posts, etc.] quite a little while before the barn was built. I never came after any more lumber but at the time I got the letter [above quoted] from C. M. Peck to build this barn. I had some conversation with Mr. C. M. Peck before he went back east about building this barn on this place. He told me he was going down to the city and see that C. C. I. Company and see about that lumber on that knoll [the lumber from the old warehouse above mentioned]. I never heard anything about it for some time, but later in the fall Mr. Peck wrote me a letter [the one last above quoted herein] from Virginia. . . . I showed it [the last mentioned letter] to Mr. Grenfell, and I told him to write to Mr. Peck [the defendant]. . . . We wrote to Mr. Peck [defendant] about the cost of the building, you see, and then after that I waited, I guess about a week, or more than a week, for the letter. And the time the letter came back I took it to Mr. Grenfell, and he told me I can have the lumber. . . . All the dealings I had in regard to the ranch was with Mr. C. M. Peck—young Mr. Peck."

The above synopsis of the testimony presented by the plaintiff is sufficient to show that the court was warranted in finding that C. M. Peck, in the transaction with the plaintiff, was acting for and as the agent, either actual or ostensible, of the defendant. To recapitulate: C. M. Peck had been in personal charge of the ranch and had during that time bought lumber from the plaintiff and had the same charged to "the

ranch account." After his departure for the east, having received a bill from the plaintiff for lumber used on the ranch, he drew a draft on the defendant for the payment of the bill and sent the same to plaintiff, and it was subsequently honored by payment by the defendant. C. M. Peck, as seen, wrote to Santos from Lexington, Virginia, directing him to proceed at once to the erection of the barn. The defendant's letters, inquiring of Santos as to the arrangements between the latter and C. M. Peck with regard to the building of a barn on the ranch, in effect recognized the authority of C. M. Peck to act for the defendant in the matter of the construction of said barn.

As to the arrangement for the procuring of the material from which the barn was to be constructed, the positive testimony of the secretary of the plaintiff, corroborated by Walworth, the plaintiff's yard foreman, is to the effect that C. M. Peck brought Santos to the office and the lumber-yard of the company and unqualifiedly instructed them to let Santos have such lumber as he might find necessary to be used upon the ranch, and that (so Grenfell testified) it was upon the instructions so given by C. M. Peck that Santos was furnished with the lumber with which the barn was built. This testimony, we repeat, is sufficient to support the finding that C. M. Peck, if not actually authorized by the defendant to act for him in the matter of the building of the barn and in directing the plaintiff to deliver to Santos the lumber necessary therefor, was, notwithstanding, ostensibly the agent of the defendant, or by the latter's acts and conduct had been sufficiently held out to be his agent in the business concerned here to warrant the plaintiff in so regarding him and dealing with him accordingly (*Robinson v. American Fish etc. Co.*, 17 Cal. App. 212, 219, [119 Pac. 388], and authorities therein referred to), and the further finding that C. M. Peck gave general instructions to the plaintiff to let Santos have such lumber for use on the ranch as he might require.

There is, it is true, a direct conflict in the evidence upon the vital facts of the controversy. C. M. Peck positively testified that the only directions he ever gave the plaintiff with regard to the delivery of lumber to Santos had relation to certain posts and other material to be used in the erection or repair of a fence upon the land in question. As to the barn, he testified that he gave Santos specific orders to construct

the same entirely from the old lumber obtained from the wrecked warehouse purchased by him before he left for the east. His letter to Santos from the state of Virginia would indicate that he intended that the old lumber referred to was to be used in the construction of the barn. It is also true that the letters from the defendant would indicate that whether the building of the barn should be proceeded with was to depend upon the consent of the defendant thereto to be given Santos. But all this testimony is, as stated, only in contradiction of that produced by the plaintiff to the effect that C. M. Peck directed it to let Santos have whatever lumber he might require for the purposes of the ranch, the result of which was, obviously, to raise a substantial conflict, and the effect thereof solely a matter for determination by the trial court.

Assuming, as is the contention, that it was true that the intention of both C. M. Peck and the defendant was that the barn should be built from the lumber obtained from the warehouse, nevertheless, these facts remain, having been found upon sufficient evidence by the court: That both C. M. Peck and the defendant desired that a barn be erected upon the ranch; that Santos had been instructed to build it; that there is testimony that C. M. Peck, having the authority to do so, gave instructions, unhampered by restrictions, conditions, or qualifications of any kind or character, to the plaintiff to let Santos have whatever lumber he needed on the ranch, and to charge the same to the ranch account; that, acting under such instructions, the lumber company did let Santos have the lumber necessary for the construction of the barn, and that the lumber so furnished Santos was actually used in the erection of the barn upon said ranch. Under these circumstances, we fail to perceive how it could change or affect the legal effect of the transaction or remove the legal obligation of the defendant to pay for the materials so obtained by Santos even if it be true that Santos did not use, in the construction of the building, the particular lumber it was the wish and the intention of C. M. Peck or of the defendant that he should have used for that purpose. Santos might have acted in bad faith with the defendant and the latter's agent, C. M. Peck, by failing to obey the directions of his superior to use the materials specified by the latter in the construction of the barn. This fact, however, constitutes no reason for holding

that the plaintiff has no basis for a just and legal claim for materials furnished Santos by express directions of the owner of the land, for which they were to be used, or, as the court found upon sufficient evidence, under directions of an agent of the owner.

Our conclusion is, as before declared, that the judgment in favor of the plaintiff upon the theory upon which we have here considered it is supported by the facts as found and the conclusions of law following therefrom.

The judgment is therefore affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 9, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 9, 1916.

[Civ. No. 1785. First Appellate District.—January 11, 1916.]

RANSOME-CRUMMEY COMPANY, Appellant, v. MARY E. WOODHAMS, Respondent.

STREET LAW—IMPROVEMENTS IN TOWN OF SANTA CLARA—REPEAL OF CHARTER PROVISIONS—CONSTITUTIONAL LAW.—The provisions of section 13 et seq. of the act entitled, "An Act to Reincorporate the town of Santa Clara" (Stats. 1872, p. 251), relating to street improvements therein, and which authorized contracts to be entered into in advance of the levy and collection of the assessment, were repealed upon the adoption of section 19 of article XI of the constitution, notwithstanding such section in terms only specifies cities as coming within its provisions, and not towns.

ID.—STATUTORY CONSTRUCTION—WORD GIVEN PARTICULAR MEANING.—When a word or phrase has been given a particular scope or meaning in one part or portion of a law, it is to be given the same scope and meaning in other parts or portions of the law and particularly of the same section thereof.

ID.—GENERAL LAWS APPLICABLE TO STREET IMPROVEMENTS.—The adoption of such constitutional provision had the effect of not only repealing that portion of the charter of the town of Santa Clara as permitted street improvements to be completed before the assess-

ments had been levied and collected, but of repealing the entire charter provision applicable to street improvements, and of relegating the town to the general laws as to its source of authority and procedure in the improvement of its public streets

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. **J. R. Welch**, Judge.

The facts are stated in the opinion of the court.

R. M. F. Soto, for Appellant.

Rogers, Bloomingdale & Free, for Respondent.

THE COURT.—This in an appeal by the plaintiff from a judgment in defendant's favor and from an order denying a new trial.

The action was brought to obtain a judgment declaring that the plaintiff has a lien upon a certain lot of the defendant in the town of Santa Clara for street work done by plaintiff under the provisions of the so-called Improvement Act of 1911 (Stats. 1911, p. 730). The answer of the defendant presents as the principal proposition in the case the question as to whether the matter of street improvement in the town of Santa Clara is governed by the provisions of the general statutes upon the subject, or by the provisions of the special charter of the town of Santa Clara.

The essential facts of the case are these: The town of Santa Clara received its present charter in 1872 under a special act of reincorporation entitled "An Act to Reincorporate the town of Santa Clara" (Stats. 1871-72, p. 251). Section 13 et seq. of said act provides a complete scheme for the improvement of the public streets of the town, one of the distinctive features of which as applicable to the case at bar is the provision that the work of the particular street improvement shall be contracted for, proceeded with, and completed, and the actual cost of the same to each lot owner as thus ascertained shall be certified by the surveyor and town marshal to the board of trustees of the town, who shall thereupon make the assessment and apportionment of the actual cost thereof to the several abutting owners, which shall constitute liens upon their respective holdings. In the year 1879 the present

state constitution was adopted. By section 19 of article XI of said constitution it was provided that "No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon or about the streets thereof, or otherwise, the cost and expense of which is chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to benefits, on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvements shall be commenced, or any contract for letting or doing the same authorized or performed." It was further provided by section 1 of article XXII of the constitution that "The provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof." That the effect of these two provisions of the state constitution was the abrogation of the provisions of all general laws and all special charters which were inconsistent with the terms of section 19 of article XI of the constitution, and which came within the provisions thereof, there can no longer remain an open question. (*McDonald v. Patterson*, 54 Cal. 245; *Donahue v. Graham*, 61 Cal. 276; *Thomason v. Ruggles*, 69 Cal. 465, [11 Pac. 20]; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, [11 Pac. 3]; *Thomason v. Ashworth*, 73 Cal. 73, [14 Pac. 615].) It is contended, however, by the respondent herein that the provisions of the charter of the town of Santa Clara do not come within the terms of section 19 of article XI of the constitution, and were not therefore repealed or abrogated by it, for the reason that the application of the provisions of said section of the constitution is expressly limited to "cities," and may not be extended to apply to "towns," and hence cannot affect the town of Santa Clara. It is very plausibly and persuasively argued by counsel for the respondent that the distinction between "cities" and "towns" is one which has been recognized from almost the inception of our state history; that in recognition of this distinction the legislature of 1850 passed two statutes—one providing for the creation and legal existence of cities [Stats. 1850, p. 87], and the other for the incorporation of towns [Stats. 1850, p. 128]; that most of the municipalities of the state which were in existence in 1879 were originally incorporated under one or the other of these two acts; that Santa Clara was incorporated in 1852 as a

"town" under the act of 1850, which provided for the incorporation of towns, and was reincorporated as a town in 1865 and again in 1872; that the state constitution of 1879, adopted in the presence of these actual conditions, repeatedly recognized and expressly maintained this distinction by numerous provisions wherein the term "city" and "town" were both employed when it was the purpose and intent of its framers to make its several provisions applicable to both; and hence that it must be concluded that when the framers of the constitution used only the word "city" in section 19 of article XI of the constitution in relation to street improvements, they intended that the provisions of that section should be limited to "cities" and should not be held to include "towns." It is also urged by the respondent that the term "cities" is a term more narrow and restricted in its meaning and application than "towns," and is always used with reference to the larger and more populous and important centers than the latter phrase, and hence must be intended by the constitution makers to be given this restricted meaning in the particular section under review.

While this train of logic is, as we have seen, persuasive in its reasoning, it has standing in the way of its adoption an obstacle which we have not been able to surmount. Section 19 of article XI of the constitution as originally adopted was two-fold as to its subject matter. The first portion of the section was that above set forth, and which, it may be incidentally stated, was eliminated from it by an amendment of the section in 1884. The second part of the section referred to the unrelated subject of the right of persons or companies supplying water or artificial light to a "city" to use the streets thereof under certain general regulations and without the requirement of a franchise from the municipality. In the case of *People v. Stephens*, 62 Cal. 209, this portion of section 19 of article XI of the constitution was the subject of construction, with special reference to the scope and meaning to be given to the word "city"; and the court there held that the word "city" as employed therein was intended by the framers of the constitution to include "town" within its meaning. At the time of this decision the section was in its original form. In the later case of *Pereria v. Wallace*, 129 Cal. 397, [62 Pac. 61], the case of *People v. Stephens* was referred to with approval. It is a well-established rule of con-

struction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law, and particularly of the same section thereof. (2 Sutherland on Statutory Construction, 2d ed., 758, and cases cited). We feel ourselves constrained by this rule of interpretation and by the foregoing cases to hold that the word "city" as used in the particular portion of the section under review in this case also embraced "town" within its scope and meaning, and hence was applicable to the town of Santa Clara, and operated to repeal those sections of its charter upon the subject of street improvements which were inconsistent with its terms.

It is earnestly insisted by the respondent, however, that this effect should not be given to the section of the constitution under review, for the reason that repeals by implication are not favored by the courts, citing many authorities to sustain this contention. There is no room or need for quarrel with the legal principle involved in those cases, but the difficulty is in its application to the instant case, for if the word "city" in section 19 of article XI of the constitution is to be construed as including "town" within its meaning, then the section must be given the same intendment and application as though the word "town" had been expressly used; and so construed there can be no question but that the portion of the section in question here is so utterly at variance with the provisions of the charter of the town of Santa Clara upon the same subject as to work the abrogation of the latter, even though the constitution had not elsewhere provided that "The provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof" (Const., art. XXII, sec. 1).

It is further contended by the respondent that even though it should be held that section 19 of article XI of the constitution as it stood before its amendment applied to the town of Santa Clara, and operated to repeal such portions thereof as were obnoxious to it, still this would not require the repeal of the entire provision of its town charter applicable to street improvements so as to permit or require such work to be done under the general laws. It is suggested that an excision might be made of that portion only of the town charter as permitted the improvement to be completed before the assess-

ments had been levied and collected with which to make it; but our examination of the provisions of the town charter in the light of the constitutional requirement has satisfied us that the two methods of providing the means of street improvement in the town of Santa Clara are so radically at opposites that no such excision would be practicable. In our opinion the effect of the constitutional provision was to relegate the town of Santa Clara to the general laws as to its source of authority and procedure in the improvement of its public streets.

It is conceded by the respondent that if the constitutional provision under consideration was effective to work an abrogation of the provisions of the town charter upon the subject in so far as they were inconsistent with it, the repeal of that portion of the section of the constitution which was accomplished in the year 1884 did not operate to revive the charter provisions. The cases of *Byrne v. Drain*, 127 Cal. 663, [60 Pac. 433], and *Ex parte Helm*, 143 Cal. 553, [77 Pac. 453], are to be distinguished from the case at bar, since the only effect of these cases was to hold that the provisions of town charters relating to municipal affairs which were subject to the control of general laws under the constitution as adopted in 1879 were to be revived when that control was removed by the amendment of section 6 of article XI of the constitution in 1896. In the case at bar the provisions of the town charter relating to street improvements "ceased" upon the adoption of the section of the constitution above quoted which was inconsistent with them, and would not be called back into being by the elimination of the constitutional provision with which they had been at variance, in the absence of express words of revivor.

By the findings of the trial court in this case all of the allegations of the complaint were specifically found to be true with the exception of subdivision c of paragraph V of said complaint, which has reference to the manner of the recordation of the warrant, assessment, and certificate of the town engineer, and the filing of the diagram as required by the provisions of section 23 of the Street Improvement Act of 1911. The court finds that the said instruments "were recorded in the office of the street commissioner of the town of Santa Clara in the following manner, namely, that copies of the warrant, assessment and certificate of the town engineer,

together with the diagram mentioned and referred to in paragraph V of the complaint, were attached together between covers by said street commissioner, and deposited by him in his office on the seventh day of February, 1912, and thereafter kept by him on deposit in his said office; that said warrant, assessment, and diagram, together with the certificate of said town engineer, were delivered to the plaintiff on the seventh day of February, 1912, and after the recordation thereof as above set forth." If this finding is to be construed as a finding that on the seventh day of February, 1912, the original warrant, assessment, and certificate were presented to the street commissioner for proper recordation, and said diagram for filing in his said office, and that thereupon said warrant, assessment, and certificate of the town engineer were then and there placed in the custody and possession of the street commissioner for such purpose, and that these copies of those original documents were then and thereafter retained by him as a part of the permanent records and files of his office, and there remained as such, and subject to the inspection of all persons who were or might become interested in the property to which the lien to be created by the proper recordation of these documents was to attach, then we are of the opinion that a liberal construction of the terms of the section of the act in question would justify the conclusion that the finding of the court as so construed shows a substantial compliance with the requirements of the statute. (*S. M. Bernard Co. v. Los Angeles*, 18 Cal. App. 626, [124 Pac. 88]; *Hager v. Melton*, 66 W. Va. 62, [66 S. E. 13].) In view, however, of the uncertainty of this finding, and of the fact that the respondent has had no opportunity on appeal to assail the sufficiency thereof, or of the facts upon which it was predicated, as constituting a compliance with the section of the act under review, we are disposed to disregard the suggestion of the appellant that it is entitled to judgment in its favor upon the findings, and to return the case for a new trial.

Judgment and order reversed, and cause remanded for a new trial.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 9, 1916.

[Crim. No. 607. First Appellate District.—January 12, 1916.]

THE PEOPLE, Respondent, v. ROY WAGNER, Appellant.

CRIMINAL LAW—MURDER—EVIDENCE—PROOF OF CORPUS DELICTI—ADMISSION.—In a prosecution for murder proof of the *corpus delicti* of the conclusive and convincing character required to support a conviction of the crime charged is not a prerequisite to the reception in evidence of the extra-judicial statements of the defendant that he had killed the deceased, but *prima facie* proof is sufficient for that purpose.

ID.—SUFFICIENCY OF PROOF OF CORPUS DELICTI.—In this prosecution of a son for the murder of his father, it is held that the evidence was sufficient *prima facie* to establish the *corpus delicti* as the foundation for the admission in evidence of the extra-judicial statements of the defendant that he caused the death of the deceased.

ID.—ADMISSIONS OF DEFENDANT—ORDER OF PROOF.—In the absence of a showing of prejudice, there is no error in admitting in evidence the defendant's extra-judicial statements prior to the proof of the *corpus delicti*.

ID.—RESULT OF EXPERIMENTS—WHEN INADMISSIBLE.—In a prosecution for murder it is prejudicial error to permit the state, over the objection of the defendant, to show the result of certain experiments made by the district attorney and peace officers with shots fired from the gun which killed the deceased at and into cardboards and blocks of wood which were intended to represent the deceased, for the purpose of rebutting the statements of the defendant that the killing was accidental, in the absence of a showing that the experiments were made under circumstances and conditions which were the same, or substantially the same, as those which existed when the killing occurred.

ID.—EVIDENCE OF EXPERIMENTS—DISCRETION—PRELIMINARY PROOF.—While the admission of evidence showing the results of experiments is largely within the discretion of the trial court, nevertheless the admission of such evidence is regulated and must be controlled by the well-settled rule that it must be first shown that the experiments relied upon were made under conditions and circumstances which were essentially the same as those which existed when the alleged occurrence took place.

ID.—INSTRUCTION—IMMATERIALITY OF EVIDENCE OF EXPERIMENTS.—An instruction declaring that the evidence of the results of experiments should not be "considered material and effective nor conclusive, but as a mere circumstance to be considered in connection with other evidence in the case," is erroneous in the particular that it declares that evidence of the results of experiments was neither material nor

effective, and should not be given, notwithstanding it correctly stated the law to the extent that such evidence was to be considered by the jury with the other evidence in the case.

ID.—CONFLICTING RESULTS OF EXPERIMENTS—DISREGARD BY JURY—ERRONEOUS INSTRUCTION.—An instruction to the effect that if the evidence of the respective experiments made by the prosecution and defendant under similar circumstances showed different results, then the result of each experiment should be disregarded by the jury, is erroneous, as such a situation amounts to no more than a conflict of evidence, which should be left to the jury for decision.

ID.—EXPERIMENTS UNDER DIFFERENT CONDITIONS—DISREGARD OF EVIDENCE—PROPER INSTRUCTION.—The refusal to instruct the jury to the effect that the evidence of the results of the experiments made by the prosecution should be disregarded unless the jury found that those experiments were made under conditions and circumstances which were the same, or substantially the same, as those which existed at the time of the killing, is error, as the determination of the trial court before ruling upon the admissibility of such evidence is not conclusive upon the jury.

ID.—ORAL ADMISSIONS—CAUTIOUS CONSIDERATION—REFUSAL OF INSTRUCTION—ABSENCE OF ERROR.—The refusal to instruct the jury to the effect that evidence of oral admissions should be viewed and considered by the jury with caution is not reversible error.

ID.—CONVICTION UPON ADMISSIONS—ESTABLISHMENT OF CORPUS DELICTI—REQUESTED INSTRUCTION—REFUSAL PREJUDICIAL ERROR.—In this prosecution it is held that under the particular and peculiar circumstances the court erred to the substantial prejudice of the defendant in refusing to charge the jury at the request of the defendant as follows: "You are instructed in this case that before you can convict the defendant you must be convinced from the evidence beyond a reasonable doubt and to a moral certainty that a criminal homicide was in fact committed; and you must be so convinced by evidence other than or in addition to the statements or admissions of the defendant, and this evidence must be sufficient to establish that the death of the deceased was produced by the criminal act of some person and was not the result of accident. The production of the dead body does not alone establish the criminal homicide; and proof of the dead body alone found, with the statements of the defendant, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before the statement of the defendant would be admissible for any purpose; and hence if you believe in this case that the only evidence which shows that a crime was committed is the production of the dead body of the deceased, coupled with the admissions or statements of this defendant, then it is your duty to acquit this defendant."

LD.—EXTRA-JUDICIAL CONFESSIONS—WHEN INSUFFICIENT.—A defendant charged with crime must not be convicted upon his extra-judicial confessions or admissions, unless such confessions or admissions be corroborated by proof *aliunde* of the *corpus delicti*.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Everts & Ewing, for Appellant.

U. S. Webb, Attorney-General, and Frank L. Guereña. for Respondent.

LENNON, P. J.—The defendant in this case, upon an information charging him with the crime of murder, was convicted of manslaughter and sentenced to serve a term of eight years in the state prison at San Quentin. The appeal is from the judgment and from an order denying the defendant a new trial.

The facts of the case upon which the people relied for a conviction, briefly stated, are these: At and prior to the time of the alleged commission of the offense the defendant, Roy Wagner, a boy of nineteen years of age, was residing with his father, the deceased, Otto F. Wagner, at the home of the latter near the city of Fresno. At the time of the commission of the offense and for three months prior thereto the defendant was the only person who resided with the deceased. Between the hours of 7 and 8 A. M. on March 15, 1915, the neighbors of the deceased heard a shot apparently fired in the vicinity of the house of the deceased, and about forty minutes thereafter saw the defendant leave his father's house and proceed at a rapid gait toward the near-by home of a Mr. J. H. Fisher. When the defendant arrived there he exclaimed to Fisher, his family, and a hired man named Dickinson, all of whom were seated at the breakfast table, "Come over. I have shot my father, and I think I have killed him." Thereupon Dickinson returned with the defendant to the home of the deceased, and upon arriving there found the dead body of the deceased lying on its back on the floor of the kitchen. Dickinson felt the face of the deceased, and the de-

fendant thereupon exclaimed, "He is dead." Fisher followed some ten minutes later, and upon arriving at the home of the deceased met the defendant at the kitchen door, who then exclaimed, "Isn't it awful." In explanation of how the killing occurred the defendant stated to both Fisher and Dickinson that while seated in a chair he had been cleaning a loaded gun, and that after cleaning the gun he reloaded it, and when attempting to lower the hammer it slipped from his thumb and discharged the contents of a shell into the body of the deceased. The defendant then voluntarily proceeded to show how the killing occurred by illustrating how he sat in the chair, and how he held the gun before and at the moment of its discharge. The defendant further stated that his father, the deceased, had repeatedly cautioned him to be extremely careful in the handling of that particular gun because the hammer thereof was defectively constructed. The autopsy upon the body of the deceased showed that the contents of the shell struck him on the right side of the head above and around the ear, producing a fracture of the skull at the base of the brain. The body of the deceased was found lying in an angular position in front of the kitchen table which was placed before and extended across the window. The feet of the deceased extended under this table. The deceased, so the defendant said, was standing in front of this table at the time the gun was discharged, and the upper sash of the window had two shot holes in it. When Dickinson and Fisher arrived at the home of the deceased the gun which did the killing was standing in a corner of the kitchen behind the kitchen table and adjacent to the window.

The prosecution offered and were permitted to show, over the objection of the defendant, the result of certain experiments made by the district attorney and peace officers in shooting into a wooden figure of about the size of the deceased, for the purpose of rebutting the statements of the defendant that the killing was the result of an accident.

The defendant did not take the stand in his own behalf, and the case was submitted to the jury upon the evidence substantially outlined above.

Proof of the *corpus delicti* of the conclusive and convincing character required to support a conviction of the crime charged was not a prerequisite to the reception in evidence of the extra-judicial statements of the defendant that he had

killed the deceased. *Prima facie* proof of the *corpus delicti* was sufficient for that purpose; and it was not essential to the proof and purpose to show that the crime charged was committed by the defendant. (*People v. Vertrees*, 169 Cal. 404, [146 Pac. 890]; *People v. Rowland*, 12 Cal. App. 6, [106 Pac. 428]; *People v. Spencer*, 16 Cal. App. 756, [117 Pac. 1039].)

We are of the opinion that the evidence relating to the finding of the body of the deceased, its position when found, the location, nature, and result of the gunshot wound which caused the death of the deceased, the position in which the shotgun which did the killing was standing when the body of the deceased was found by Fisher and Dickinson, the remoteness of the gun from the place where the body of the deceased had apparently fallen and remained after the shooting, coupled with the fact that the defendant was seen leaving the house of the deceased and proceeding in the direction of the Fisher place some forty minutes after the sound of a shot was heard by neighbors apparently fired from a gun in the vicinity of the house of the deceased, was not only sufficient to repel the inference that the death of the deceased was self-inflicted, or the result of a stray shot entering through the kitchen window from the gun of a passing hunter, but was sufficient *prima facie* to establish the *corpus delicti* as a foundation for the admission in evidence of the extra-judicial statements of the defendant that he had caused the death of the deceased.

It is of no consequence in the present case that proof was not made until after the reception in evidence of the defendant's extra-judicial statements, of the fact as to the time when the defendant was seen leaving the home of the deceased after a shot was heard in that vicinity. If this fact was essential to the proof of the *corpus delicti* as the foundation for the admission in evidence of the defendant's extra-judicial statements, it ultimately appeared in evidence; and in the absence of a showing that the defendant was prejudiced thereby, the irregularity in the order of proof must be held to be harmless. (*People v. Barnnovich*, 16 Cal. App. 427, [117 Pac. 572].)

The trial court erred to the substantial prejudice of the defendant in its ruling permitting the prosecution to show, over detailed and sufficient objections, the result of certain

experiments made by the district attorney and others with shots fired from the gun which killed the deceased at and into cardboards and blocks of wood which were intended to represent the deceased, and supposedly placed in the position in which he stood at the time of the killing. The purpose of these experiments, as declared by the district attorney, was "to show the pattern that would be formed by shooting a shell of the same kind that the defendant said was used that morning and using it in the same gun." The evidence concerning the result of the experiments tended to show that if the gun had been discharged on the morning of the killing in the manner and under the same circumstances described by the defendant, the pattern and location of the shot would have been different from the pattern and location of the shot actually found upon the head of the deceased and in the window casement. While the admission of evidence showing the results of experiments is largely within the discretion of the trial court, nevertheless the admission of such evidence is regulated and must be controlled by the well-settled rule that it must be first shown that the experiments relied upon were made under conditions and circumstances which were essentially the same as those which existed when the alleged occurrence took place. (*People v. Woon Tuck Wo*, 120 Cal. 294, [52 Pac. 833]; *People v. Hill*, 123 Cal. 571, [56 Pac. 443]; *People v. Solani*, 6 Cal. App. 103, [91 Pac. 654]; *State v. Justus*, 11 Or. 178, [50 Am. Rep. 470, 8 Pac. 337]; *Commonwealth v. Piper*, 120 Mass. 185.) The rule in this behalf is well stated in the case of *Hisler v. State*, 52 Fla. 30, [42 South. 692]. In that case the defendant was charged with murder, and his defense was that the shooting which resulted in the death of the deceased was accidental. The prosecution sought to discredit the testimony of the defendant as to the conditions under which the shooting was done by introducing in evidence the result of an experiment made by shooting at a target, and which tended to show the area over which the shot from a gun would scatter at a given distance. The case was reversed partly because of the admission of such evidence without first having laid the full foundation therefor, and in the course of its opinion the court said:

"Evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible

where the conditions attending the alleged occurrence and the experiments are not shown to be similar. The similarity of circumstances and conditions goes to the admissibility of the evidence and must be determined by the court. If in the discretion of the trial court such proffered evidence is rejected, the appellate court will not review the ruling unless an abuse of discretion appears; but where such evidence is admitted over proper objections, and the rule as to similarity of circumstances and conditions attending the occurrence and the experiment does not appear to have been complied with in admitting the evidence, the appellate court will review the ruling, and if error therein be found, and it does not appear from the whole record that no harm could have resulted to the defendant from the admission of such evidence, the error may cause a reversal of the judgment. Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court from the nature of the experiments that the jury will be enlightened rather than confused. In many circumstances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful rather than helpful."

In the present case no showing was made that the experiments were made under circumstances and conditions which were all the same, or substantially the same, as those which existed when the killing occurred. Thus it was not shown, or attempted to be shown, that the block of wood which was supposed to represent the head and body of the deceased stood in the same position and at the same angle as the deceased stood when he was shot. This the prosecution was unable to do because the defendant, in his explanation and illustration of the circumstances attending the shooting, made no reference to the position of the deceased when he was shot further than to say that he was standing in front of the kitchen table washing the dishes; and for aught that appears in the record, the deceased at the time he was shot may have been standing erect at either end of the table, or may have been standing slightly stooped forward with his head turned slightly toward or entirely away from the defendant. Obviously these added and possible circumstances would have materially altered the result of the experiments relied upon; and the fact that the prosecution was unable to re-

produce substantially all of the circumstances and conditions attending the killing should have prompted a rigorous enforcement rather than a relaxation of the rule under discussion. Doubtless the result of the experiments erroneously admitted in evidence tended in no small degree to involve in doubt, if not entirely discredit, the defendant's explanation and illustration of the killing which he made to Fisher and Dickinson.

The trial court rightfully refused to give the instruction requested by the defendant which declared that the evidence of the result of experiments should not be "considered material and effective nor conclusive, but as a mere circumstance to be considered in connection with other evidence in the case." Clearly, this instruction was erroneous in the particular that it declared that evidence of the result of experiments was neither material nor effective; and the fact that it in part stated the law correctly to the extent that such evidence was to be considered by the jury with the other evidence in the case neither warranted nor required the giving of the instruction in whole or in part; for it is the rule that the trial court may rightfully refuse a requested instruction which, although correct in part, involves an erroneous statement of the law. (*People v. Davis*, 135 Cal. 163, [67 Pac. 59].)

The instruction in question finds no support in the case of *People v. Levine*, 85 Cal. 39, 43, [22 Pac. 969, 24 Pac. 631]. The opinion in that case does not declare that as a matter of law the results of experiments must be considered as neither material nor effective. Whatever was said by the court in that case concerning "material and effective evidence" was said by way of argument; and the only point decided upon the experimental phase of the case was that evidence of the result of experiments is not conclusive but must be considered in connection with the other evidence in the case.

The trial court also rightfully refused the requested instruction which was to the effect that if the evidence of the respective experiments made by the prosecution and defendant, made under similar circumstances, showed different results, then the result of each experiment should be totally disregarded by the jury. Such a situation in the evidence

would amount to no more than a conflict of evidence which, like the ordinary conflict of evidence, should be left to the jury for decision.

The refusal of the trial court to give a requested instruction to the effect that evidence of oral admissions should be viewed and considered by the jury with caution was not error. As was stated in the very recent case of *People v. Raber*, 168 Cal. 316, [143 Pac. 317], "Such an instruction, if not in violation of the constitutional injunction against charging juries on matters of fact, is one that may be properly refused as a 'mere commonplace.' In short, a judgment will not be reversed either for the giving or refusing of this instruction."

Complaint is made of the refusal of the trial court to give several other requested instructions, but by comparison we have ascertained that in every instance the subject matter of each of the requested instructions now under discussion was covered substantially and correctly in the charge of the court.

The trial court, however, erred in refusing to give certain other instructions requested by the defendant, to the effect that the evidence of the result of the experiments made by the prosecution should be disregarded unless the jury found that those experiments were made under conditions and circumstances which were the same, or substantially the same, as those which existed at the time of the killing. As a matter of course, the question of whether or not the conditions and circumstances attending the making of the experiments in question were substantially similar to those attending the killing, was in the first instance a question of fact to be determined by the trial judge before ruling upon the admissibility of the evidence of the result of the experiments, but the trial court's determination of that question was not conclusive upon the jury. Undoubtedly such evidence was proffered and permitted upon the theory that it would assist the jury in arriving at a correct conclusion concerning the conduct and relative positions of the deceased and defendant at the time of the killing, and therefore the question as to whether or not the experiments relied upon were made under the same or substantially the same conditions and circumstances as those which existed at the

time of the killing was one of fact which ultimately was for the jury to weigh and determine. While the instruction immediately under consideration may not have been entirely free from ambiguity, nevertheless in its essential features and as a whole it was sufficiently correct and certain to warrant and require its giving in the absence of anything upon the same subject in the charge of the court.

We are satisfied that under the particular and peculiar circumstances of the present case the trial court erred to the substantial prejudice of the defendant in refusing to charge the jury at the request of the defendant as follows: "You are instructed in this case that before you can convict the defendant you must be convinced from the evidence beyond a reasonable doubt and to a moral certainty that a criminal homicide was in fact committed; and you must be so convinced by evidence other than or in addition to the statements or admissions of the defendant, and this evidence must be sufficient to establish that the death of the deceased was produced by the criminal act of some person and was not the result of accident. The production of the dead body does not alone establish the criminal homicide; and proof of the dead body alone found, with the statements of the defendant, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before the statement of the defendant would be admissible for any purpose; and hence if you believe in this case that the only evidence which shows that a crime was committed is the production of the dead body of the deceased, coupled with the admissions or statements of this defendant, then it is your duty to acquit this defendant."

While the foregoing proposed instruction may not have been perfect in its statement of the rule and principle of law that it was evidently intended to embody, nevertheless, in the absence of anything upon the same subject in the charge of the court, we think it was a sufficiently clear and correct statement of the familiar, well settled, and uniformly adhered to rule of law which imperatively declares and directs that a defendant charged with crime must not be convicted upon his extra-judicial confessions or admissions, unless such confessions or admissions be corroborated by proof *aliunde* of the *corpus delicti*. The proposed instruction was not

faulty in any of the particulars pointed out in the case of *People v. Frey*, 165 Cal. 140, [131 Pac. 127], where it was held that a requested instruction upon the same subject was rightfully refused not only because the phraseology employed was calculated to mislead the jury, but also and principally for the reason that it did not contain a definition of the phrase *corpus delicti*. Succinctly stated, the phrase *corpus delicti* means the body of the offense, the essence of the crime, and proof of the *corpus delicti* involves two distinct but nevertheless interdependent factors, viz., the commission of a criminal act and the defendant's guilty participation in the perpetration thereof. While the proposed instruction in the present case did not in terms refer to the *corpus delicti*, nevertheless it did embody all of the essentials of a definition of that phrase, and stated substantially the requirements of the rule involved therein. This being so, no good reason appears why the court should not have given the proposed instruction, or have covered the subject matter thereof in its charge to the jury. We are not unmindful of the rule that where, in any given case, there is evidence apart from the extra-judicial confessions or admissions of the defendant, sufficient to fully establish the *corpus delicti*, the refusal to charge the jury upon that subject will not constitute reversible error. (*People v. Tomalty*, 14 Cal. App. 224, [111 Pac. 513].) Although the evidence of the *corpus delicti* presented in the present case was, as previously pointed out, sufficient to warrant the reception in evidence of the extra-judicial statements of the defendant, and upon the whole may have been, standing alone, barely sufficient to have sustained the conviction of the defendant, nevertheless it was not, in our opinion, of a character so conclusive and convincing as to warrant us in saying that the failure of the trial court to give the requested instruction, or state in its charge to the jury the rule of law under discussion, did not operate to the substantial prejudice of the defendant. We cannot conceive that the jury in arriving at the conclusion implied from the verdict, that the *corpus delicti* had been established, did not resort to the evidence erroneously admitted, showing the result of experiments, which tended to discredit the defendant's statements that the killing was the result of an accident, and consequently

it cannot be said that the extra-judicial statements of the defendant formed no part of the evidence upon which the jury determined that the *corpus delicti* had been established. It is evident, therefore, that the proposed instruction was not only of peculiar pertinency to the paramount issue in the case, but was clearly essential to a proper consideration of the evidence by the jury, and that being so, there is no escape from the conclusion that the refusal of the trial court to give such instruction, or to cover the subject matter in its own charge, was an error which, because it deprived the defendant of a substantial right and undoubtedly contributed to the verdict, was sufficient in itself to compel a reversal of the judgment and the granting of a new trial.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1512. First Appellate District.—January 12, 1916.]

SPRAGUE CANNING MACHINERY COMPANY (a Corporation), Respondent, v. WESTERN RANCHING CORPORATION, Appellant.

ORDER FOR PAYMENT OF MONEY—EVIDENCE—CONSTRUCTION OF INSTRUMENT.—In this action to recover upon a written order calling for the payment of various sums of money upon different dates, which was drawn upon the defendant by a sales agent employed by it to make disposition of certain lands, and which was accepted by the plaintiff in payment of certain advances made by it to such agent to make such sales, it is held that, in the light of the evidence, the dates set after the several installments which were to be paid by the terms of the accepted order referred, not to the times when commissions would be due and payable to such agent from the defendant, but that they referred to the dates whereon the several sums set before them would be due and payable by the defendant to the plaintiff without respect to when or whether any particular amount of commissions was then earned or payable.

ID.—EFFECT OF ORDER—NOVATION.—It is also held that on the date of the drawing and acceptance of the order a novation was agreed to and accomplished between the parties thereto, and that whatever contingencies there might be as to the amount of commissions then or thereafter to be chargeable to the defendant as between itself and such agent, were assumed by the defendant, and were not to affect or qualify the terms of its said acceptance or the amounts to become due the plaintiff thereon.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. J. Trabucco, Judge presiding.

The facts are stated in the opinion of the court.

T. T. C. Gregory, Theodore W. Chester, and Thomas A. Allan, for Appellant.

Dan Hadsell, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in plaintiff's favor and from an order denying a new trial. There is also an appeal from an order of the trial court denying defendant's motion made under section 663 of the Code of Civil Procedure to vacate the judgment and enter a judgment in favor of the defendant upon the findings.

As to the latter appeal, the respondent urges that it must be denied, for the reason that the defendant's motion for another judgment under said section of the code was made after it had taken and perfected its appeal from the judgment, and had thereby removed the cause from the jurisdiction of the trial court for every other purpose than that of the hearing and determination of a motion for a new trial; in other words, that the defendant, by first taking its appeal from the judgment, had deprived itself of recourse to the remedy provided by section 663 of the Code of Civil Procedure. The conclusions we have reached respecting the merits of the case render unnecessary a decision of this question at the present time.

The action is one brought to recover the sum of eight hundred dollars alleged to be payable and unpaid upon a certain order which was in words and figures as follows:

"Chicago, 2/17/11.

"Western Ranching Corporation,

"Chicago, Ill.

"Gentlemen:

"Please pay to the Sprague Canning Machinery Co. commissions due me as follows:

100.00	March	15, 1911
100.00	April	15, "
200.00	May	15, "
200.00	June	15, "
100.00	July	15, "
100.00	Aug.	15, "
200.00	Sept.	15, "
100.00	Oct.	15, "
100.00	Nov.	15, "
100.00	DEC.	15, "
700.00	Jany.	15, 1912

and charge same to my account.

"W. J. LATCHFORD."

which said order was accepted by the defendant at the time it was drawn and as a part of the transaction.

The first contention of the appellant is that its general and special demurrer to the complaint herein should have been sustained for the reason that it is nowhere alleged in said complaint that the commissions to be paid to said W. J. Latchford by the defendant, and upon the basis of which this order was given and accepted, ever became due or payable from the defendant to Latchford, and that in the absence of such averment the complaint does not state a cause of action. The decision of this point, however, depends upon the construction to be placed upon the terms of the above order in the light of the facts of the case. These, as developed by the evidence and found by the court, are substantially as follows: It appears that about the middle of the year 1910 the defendant, being desirous of employing W. J. Latchford to act as its sale agent upon commissions in the disposition of certain lands, went, through its president, to the plaintiff and suggested that the latter make advances to Latchford of the moneys necessary for him to go ahead with this work, at the rate of \$250 a month for an indefinite period. Acting upon the assurance of the president of the defendant that the risk would be nominal and the returns

certain, the plaintiff made the suggested advances to Latchford for some time and until they had aggregated a sum in excess of two thousand dollars. Receiving no return the plaintiff, through its president, Mr. Trench, and its secretary, Mr. Babcock, had a meeting with Mr. Latchford and with Mr. Crane, president of the defendant, at which it was stated by Latchford and acquiesced in by Crane that the defendant owed Latchford several thousand dollars in commissions, upon which the officers of the plaintiff demanded a present settlement of its advances, and were insistent that its account with Latchford be then and there closed up and settled in cash, but when Mr. Crane said that his company could not pay cash at that time but would be able to make installment payments, the order above set forth was suggested and drawn, the president of the plaintiff stating that "if the Western Ranching Company will accept this draft on them for the amount stated to be paid on the dates mentioned it will serve the purpose of the Sprague Canning Company as well as cash, and enable us to dismiss W. J. Latchford's account on our books." The defendant's president, Mr. Crane, indorsed its acceptance upon the order, and apparently acquiesced in the above statement as to its purpose and effect, which being done the plaintiff at once credited the account of W. J. Latchford upon its books with the sum of two thousand dollars, and charged the defendant as its debtor with said sum.

The court found in substance the foregoing facts, and also found substantially, although not in express words, that a novation was thereby and then and there accomplished by which the plaintiff accepted the defendant as its debtor in the place and stead of Latchford, and released the latter from further liability for said advances. The evidence in the case sufficiently sustains these findings, although it also discloses, and the court found, that after the making and acceptance of the order difficulties arose between Latchford and the defendant, as a result of which only a comparatively small amount of commissions ever became due from the defendant to Latchford, and hence, as the defendant claims, only the sum of \$68 became due and payable by the defendant to the plaintiff upon the aforesaid order.

From the foregoing statement of the facts as developed by the evidence and found by the court, two conclusions are

to be drawn which are determinative of every material point in the case: The first is that as to the dates set after the several installments which are to be paid by the terms of the accepted order, those refer not to the times when commissions would be due and payable from the defendant to Latchford, but they refer to the dates whereon the several sums set before them will be due and payable by the defendant to the plaintiff without respect to when or whether any particular amount of commissions was earned or payable. This being so, it was not necessary for the plaintiff to make any averment in its complaint with respect to whether any such commissions had become due or payable at the time this suit was brought. All that it had to aver was that the sums due to it by the terms and at the times specified in said order were unpaid. The defendant's demurrer was properly overruled.

The next conclusion to be drawn from the findings of the court is that on the date of the drawing and acceptance of the order in question a novation was agreed to and accomplished between the parties thereto, and that whatever contingencies there might be as to the amount of commissions then or thereafter to be chargeable to the defendant as between itself and Latchford, were assumed by the defendant and were not to affect or qualify the terms of its said acceptance or the amounts to become due the plaintiff thereon. So far as the latter was concerned, the transaction which took form and expression in this order was the equivalent of a cash transaction, and was to serve as a reimbursement to it of the sums of money advanced to Latchford at the defendant's suggestion and for the mutual benefit of them both.

The authorities fully sustain the legal conclusion that the facts as shown in the evidence and found by the court were sufficient to create and constitute a novation between the parties within the meaning and intent of the code. (Civ. Code, sec. 1530; *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 561, [86 Pac. 820]; *Bank of Montreal v. Potts*, 93 Mich. 342, 53 N. W. 522.)

From these views it follows that the findings of the court—which the evidence in the case supports in their turn—sustain the judgment; that the motion of the defendant for another and different judgment under section 663 of the Code

of Civil Procedure was therefore properly denied; and that the order of the court denying the same, and also the judgment and order denying a new trial, should be and they are hereby affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 11, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 9, 1916.

[Civ. No. 1749. First Appellate District.—January 18, 1916.]

F. J. GHISELLI, Respondent, v. **ALEXANDER THORSTENSEN et al.**, Appellants.

QUIETING TITLE—EVIDENCE—TAX DEED—INSUFFICIENT COMPLAINT—DEFECTIVE DESCRIPTION.—In an action to quiet title to a lot of land wherein the plaintiff based his title upon a tax deed, it is error to admit in evidence the documentary proofs of the assessment, sale, and tax deed in support of such title, where the description of the land set forth in the complaint with all of its courses running either northeasterly or southeasterly is radically defective, in that it cannot be made to describe a rectangular piece of land, or to include more than a small triangular fraction of the lot to which the documentary evidence related and which the findings of the court described.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George L. Jones, Judge presiding.

The facts are stated in the opinion of the court.

Hiram E. Casey, Charles F. Blandin, L. A. Kottinger, and Milton Shepardson, for Appellants.

H. M. Anthony, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of the plaintiff and from an order denying a new trial.

The action is in form an action to quiet title to a tract of land, the plaintiff's alleged title to which rests upon a tax deed. The first contention of the appellants to be considered is that relating to the sufficiency of the description of the land in question as set forth in the complaint to justify the admission of the documentary evidence upon which the title of the plaintiff must rest. The action was commenced prior to the eighteenth day of April, 1906, and the complaint and whatever other papers in the case were then on file were destroyed in the conflagration of that date. In the month of June of the following year the plaintiff upon proper application obtained an order for the restoration of the records in the case, and thereupon filed what purported to be a copy of the original complaint in the action. The description of the property contained in this restored complaint is as follows: "Commencing at a point on the southeasterly of Jessie street distant thereon 203 feet northeasterly from New Anthony street, thence running northeasterly along the said southerly line of Jessie street 15 feet; thence at a right angle southeasterly 87 feet and 6 inches; thence at a right angle southeasterly 15 feet, and thence at a right angle northeasterly 87 feet and 6 inches to the point of beginning."

It is obvious that this description with all of its courses running either northeasterly or southeasterly is radically defective, in that it cannot be made to describe a rectangular piece of land or to include more than a small triangular fraction of the lot of land to which the documentary evidence in the case relates and which the findings and judgment of the court describe. This being so, the objections which the defendant Blandin urged to the admission in evidence of the essential proofs upon which the plaintiff relied to sustain his title presented this point to the trial court at all stages of the trial when such proofs were offered; and it cannot therefore be said, as the respondent now contends, that the point of the insufficiency of the complaint in the matter of this description is being for the first time urged in this court; nor does the record before us sustain the respondent's further contention that the description in the original complaint which was destroyed in the conflagration

was correct; on the contrary, every inference which arises from the proceedings attending the restoration of the lost record leads to the conclusion that the error is one which existed from the inception of the case. The only crumb of comfort which the respondent can find in this record consists in the fact that in two of the several answers which the defendants filed in the case, and in connection with denials therein of the plaintiff's title, a correct description of the lot appears. The record discloses, however, that these answers were filed shortly after the loss of the original papers and before their attempted restoration; and it further appears that the cause did not go to trial upon these answers, but upon a second amended answer filed long after the restoration of the record in which no description of the property appears. In this state of the record in this case we are constrained to hold the plaintiff's complaint herein insufficient to justify the introduction of the documentary proofs of the assessment, sale, and tax deed which the plaintiff proffered in support of his title and to sustain the judgment of the court based upon such proofs.

In view of the fact that the appeal must be sustained and the cause returned to the trial court for such further proceedings therein as may be requisite for the preparation of a proper record for the retrial of the cause, we do not deem it necessary at this time to pass upon the other points in the case, involving, as they do, the sufficiency of the assessment, sale, and conveyance of a lot other than that described in the plaintiff's complaint.

Judgment and order reversed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 11, 1916.

[Civ. No. 1751. First Appellate District.—January 14, 1916.]

GEORGE W. MERRILL, as Administrator, etc., Respondent,
v. M. S. KOHLBERG, Appellant.

DAMAGES—BREACH OF CONTRACT—PLEADING—SUFFICIENCY OF EVIDENCE

—GENERAL VERDICT.—Where in an action for damages for breach of a contract to purchase goods to be manufactured and delivered, the complaint purports to state a cause of action in two counts, one upon an oral contract and the other on a written contract, and the evidence is amply sufficient to support the finding of the jury implied from the general verdict that the defendant breached the oral contract, the insufficiency of the evidence to establish the breach of the written contract becomes immaterial.

ID.—STATUTE OF FRAUDS—SIGNING OF MEMORANDUM—PART RECEIPT.

Where it is pleaded and proven that the written memorandum of the contract relied upon in the first count of the complaint was signed by the defendant and also that the defendant received and accepted part of the goods, the right of the plaintiff to recover is not inhibited by the statute of frauds.

ID.—MEASURE OF DAMAGES—TRIAL UPON ERRONEOUS THEORY—APPEAL—

RULE.—Where the counsel for the defendant insisted over the plaintiff's protest that the trial should proceed upon the erroneous theory that the measure of damages was covered and controlled by sections 3311 and 3353 of the Civil Code, which in effect declare the measure of damages for the breach of a buyer's agreement to purchase personal property is the difference between the contract price and the market value, he cannot insist upon appeal that the plaintiff's damages should have been established under section 1512 of such code, which in effect provides the measure of damages in cases of prevention of performance of contracts to be the difference between the cost of manufacture and the contract price.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Franklin J. Cole, Judge presiding.

The facts are stated in the opinion of the court.

Wise & O'Connor, for Appellant.

Philip Bancroft, for Respondent.

LENNON, P. J.—In this action for damages for breach of contract the plaintiff upon the verdict of a jury recovered

a judgment against the defendant in the sum of three thousand dollars, from which and from an order denying a new trial the defendant has appealed.

The plaintiff's complaint purported to state a cause of action in two counts,—one upon an oral contract and the other upon a written contract. The first count in substance alleged that in the month of May or July, 1907, the defendant at Jersey City, state of New Jersey, entered into a contract with Harriett S. Hall, plaintiff's testatrix, a memorandum of which was signed and delivered to her on the tenth day of July, 1907, by the defendant, whereby it was agreed that she would sell to the defendant one thousand two hundred dozen pairs of gloves of a quality known as the 2074 M. C., at the rate of \$9.50 per dozen, to be delivered each month commencing with the month of December, 1907; that the gloves were to be manufactured by said Harriett S. Hall upon receiving from the defendant, a sufficient length of time in advance of the manufacture to enable her to comply with the desires of the defendant, specifications designating the sizes and colors in which he desired the gloves to be manufactured and delivered; that such specifications were made and furnished by the defendant for 275 dozen pairs of gloves, which were actually manufactured, delivered to and accepted by the defendant and paid for; that notwithstanding the fact that said Harriett S. Hall performed all of the conditions of said contract on her part to be performed, and was at all times ready and willing to deliver the gloves contracted for to the defendant at the rate of two hundred dozen pairs per month, the defendant continually, intentionally, and in breach of said contract failed to specify the sizes or colors in which the remaining deliveries of gloves were to be made, and finally, on July 10, 1908, informed said Harriett S. Hall that he was not in a position to take any more gloves from her, and would not accept any further delivery of gloves contracted for, and that he would not pay for the same if they were delivered, all of which it was alleged prevented said Harriett S. Hall from manufacturing and delivering the full quantity of the gloves called for by the contract. Then follows an allegation to the effect that said Harriett S. Hall could have manufactured and delivered the remaining 925 dozen pairs of gloves at a total cost to her of \$4.62 per dozen, which would have resulted

in a net profit to her of \$4.87 per dozen pairs, and that as a consequence of the refusal of the defendant to perform his part of the contract she was damaged in the sum of \$4,514.

The second count of the plaintiff's complaint consisted of a restatement of the allegations of the first cause of action in every particular save and except that the contract was specifically alleged to have been expressed in writing.

The defendant, answering, denied all of the material allegations of the plaintiff's complaint, and at the same time cross-complained upon a purported cause of action for damages in the sum of \$2,636.25, based upon the alleged refusal of the plaintiff's testatrix to manufacture and deliver to the defendants the full quantity of the gloves called for by the contract. The defendant, however, does not appear to be dissatisfied with the verdict and judgment entered against him upon the issues raised by the cross-complaint, and therefore that phase of the case need not be further adverted to.

The principal point presented in support of the appeal is that the evidence adduced at the trial is not sufficient to support a finding which it is insisted, in order to support the judgment, must be implied from the verdict of the jury to the effect that the contract pleaded and relied upon for a cause of action in the second count of the plaintiff's complaint consisted of a valid and binding obligation. Conceding, without deciding, the question as to whether or not the contract relied upon in the second count of the plaintiff's complaint was defective in the several particulars claimed by counsel for the defendant, nevertheless the judgment and verdict must stand.

The vice of the argument of counsel for the defendant made in this behalf is to be found in the erroneous assumption that a finding of the validity of the alleged written contract was essential to support the verdict. The verdict was general in its terms, and consequently covered every issue in the case, and must be upheld if it finds support in the evidence adduced upon the whole case. The evidence proffered and admitted in support of the plaintiff's case was not directed or limited to any particular phase of the case, and as a matter of course it was not essential to a recovery by the plaintiff that he should establish the due execution and breach by the defendant of both an oral and written con-

tract. Proof of either would suffice to warrant and support a judgment in his favor. An inspection of the record satisfies us that the evidence adduced upon the whole case is amply sufficient to support the finding of the jury implied from the verdict that the defendant entered into and subsequently willfully and without just cause breached the oral contract alleged and relied upon for a cause of action in the first count of the plaintiff's complaint; and therefore, conceding the correctness of the defendant's contention concerning the insufficiency of the evidence to support the implied finding of the execution and breach of an express contract, the verdict and judgment must stand.

Incidentally it is urged that even though the evidence shows the execution and breach of the oral agreement pleaded in the first count of the complaint, the plaintiff was not as a matter of law entitled to recover thereon, because *prima facie* it was inhibited by the statute of frauds. The answer to this contention is that the plaintiff's complaint pleaded, and the evidence adduced in support thereof showed that a written memorandum of the contract relied upon in the first count of the complaint was signed by the defendant, the party to be charged. Moreover, the plaintiff's complaint alleged—and the allegation is amply supported by the evidence—that the plaintiff's testatrix manufactured and forwarded 275 dozen pairs of gloves pursuant to the terms of the contract, which the defendant received and accepted. These pleaded and proven facts were sufficient to take the contract in question without the statute of frauds. (Code Civ. Proc., sec. 1973.)

Evidently the case was tried upon the suggestion of counsel for the defendant, and despite the persistent protest of counsel for the plaintiff, upon the theory that the measure of the plaintiff's damage was covered and controlled by the provisions of sections 3311 and 3353 of the Civil Code, which in effect declare that the measure of damages for the breach of a buyer's agreement to purchase personal property is the difference between the contract price and the market value. It is now insisted upon behalf of the defendant that the plaintiff's damages should have been established under the provisions of section 1512 of the same code, which in effect provide that the measure of damages in cases of the character pleaded and proven by the plaintiff in the present case is the

difference between the cost of manufacture and the contract price.

There would be much force in this contention if it were not for the fact that the record shows that the counsel for the defendant insisted that the trial of the case should proceed upon the theory that the measure of the plaintiff's damage was the difference between the contract price and the market value of the goods contracted for.

The plaintiff pleaded a cause of action which proceeded upon the theory that the gloves contracted for were not manufactured by plaintiff's testatrix because of the defendant's refusal to keep his part of the contract, and clearly contemplated that the measure of the plaintiff's damage resulting from the defendant's prevention of the plaintiff's performance of the contract would be the difference between the contract price and the cost of manufacture, as provided in section 1512 of the Civil Code. Counsel for the plaintiff endeavored to present the case upon that theory, but was thwarted in his efforts to introduce evidence of the cost of manufacture by the insistent and successful objections of the counsel for the defendant that "such evidence was incompetent, irrelevant and immaterial, as the true measure of damages was the difference between the contract price of \$9.50 per dozen pairs of gloves, and the market price of the gloves at the nearest market—Jersey City; and that plaintiff's theory of damages as set forth in the first amended complaint, viz., the difference between the cost of manufacture of the gloves and the contract price was erroneous." Upon this objection being sustained by the trial court over the protest of the plaintiff, permission was asked and granted to amend the plaintiff's complaint to meet the objection and conform to the ruling of the court. Thereafter counsel for the respective parties and the trial court proceeded in the trial of the case upon the theory that the measure of the plaintiff's damage was the difference between the market value at the nearest market and the contract price.

After having led the court into error and compelled counsel for the plaintiff to adopt and conform to an erroneous theory for the trial and determination of the case, it surely does not lie in the mouth of the defendant to insist in support of the appeal that the case should have been tried upon the theory first adopted by the plaintiff, which counsel for the defendant

now contends to be the correct one. (*Durkee v. Chino Land etc. Co.*, 151 Cal. 561, [91 Pac. 389]; *Hasler Co. v. Griffing etc. Co.*, 133 Ill. App. 635; *Wilson v. Chicago etc. Ry. Co.*, 144 Iowa, 99, [121 N. W. 1102].)

The opinion of the supreme court of the state of Utah in the case of *Lebcher v. Lambert*, 23 Utah, 1, [63 Pac. 628], in disposing of a similar point, aptly applies to the situation presented here. In that case the court said that "To permit a party who has tried his case wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position and adopt another and different theory on appeal, would not only be unfair to the trial court, but manifestly unjust to the opposing litigant; and especially would this be true where, as in the case at bar, respondent insisted in the lower court on trying the case on the theory now contended for by appellant but, in pursuance of objections made by her, was overruled by the court." It should be noted in passing that the counsel who now raises this point is not responsible for the objection made during the trial, he not having participated therein.

The complaint as amended by leave of the court during the trial alleged that the nearest market for the gloves contracted for was the city of New York in the state of New York. This allegation was not denied in the amended answer of the defendant filed during the trial and after the plaintiff's complaint had been so amended. This being so, it is an admitted fact in the case that the city of New York was the nearest market for the gloves contracted for, and therefore the defendant will not now be heard to complain that there was no evidence of the market value of the gloves in Jersey City, where delivery was to be made under the terms of the contract.

The plaintiff's pleading and proof are not at variance. True it is that the plaintiff alleges that the plaintiff's testatrix performed "all the terms and conditions of the contract on her part to be performed," and the evidence shows that she did not manufacture and deliver the full quantity of gloves contracted for. But the allegation of the complaint in this particular, considered and construed in conjunction with other allegations of the complaint, may be fairly said to mean no more than that plaintiff's testatrix duly performed all the conditions of the contract on her part to be per-

formed up to the time she was prevented from further performance by the wrongful conduct of the defendant. And even if that were not the correct construction of the plaintiff's pleading, the worst that could be said of it is that it was ambiguous and uncertain—a fault which cannot be availed of here in the absence of a special demurrer.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 13, 1916.

[Civ. No. 1430. Third Appellate District.—January 14, 1916.]

A. BRONGE, Respondent, v. MOWAT & COMPANY,
Appellant.

CONTRACT—SALE OF RAISIN CROP—PLEADING—AMENDMENT OF COMPLAINT—REFUSAL TO STRIKE FROM FILES—SINGLE TRANSACTION.—

In this action, which involved but a single transaction of the alleged sale by plaintiff and purchase by defendant of a certain lot of raisins at a certain price per pound alleged to have been delivered in a certain number of sweat boxes, as to which latter the only dispute was whether or not the defendant had appropriated them to its own use and benefit and as to their value, it is held that the defendant was not prejudiced by the refusal to strike the second amended complaint from the files on the ground that it stated a new cause of action, as the facts all related to one and the same transaction and the relative rights of the parties were fully exploited at the trial upon such complaint and the answer thereto.

ID.—QUALITY OF RAISINS—SUFFICIENCY OF EVIDENCE.—It is held herein that there was evidence from which the jury were justified in finding that the raisins were of the quality called for by the contract.

ID.—APPEAL—FINDING ON CONFLICTING EVIDENCE.—Where the evidence is conflicting and there is substantial evidence sufficient to justify the finding in question, the reviewing court will not disturb it even though the evidence would have justified a finding favorable to the opposing party.

ID.—TIME OF DELIVERY—SUFFICIENCY OF EVIDENCE.—It is also held that considering all the circumstances, together with the failure to

express a definite date for the delivery of the raisins, the jury were justified in finding that there was no violation of the terms of the contract so far as the time of delivery was concerned.

ID.—ACCEPTANCE OF RAISINS—SUFFICIENCY OF EVIDENCE.—Where it is shown that the raisins were such as were called for by the contract and were delivered on time, it became defendant's duty to accept and pay for them.

ID.—ACCEPTANCE OF PORTION OF RAISINS—EFFECT UPON DELIVERY—INSTRUCTION.—An instruction "that the evidence is without contradiction in this case that the raisins in question were tendered to defendant, who thereupon accepted a portion thereof; and if you believe such evidence and so find, then the court instructs that the defendant is estopped from claiming that such raisins were not delivered on time," is erroneous, but without prejudice, where it is found on sufficient evidence that the raisins were of the proper quality and tendered on time.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. George E. Church, Judge.

The facts are stated in the opinion of the court.

Strother & Aynsworth, and M. K. Harris, for Appellant.

James Gallagher, and L. L. Cory, for Respondent.

CHIPMAN, P. J.—The original complaint alleged that "on or about the 17th day of September, 1912, plaintiff sold and delivered to defendant 78,458 pounds of raisins at the agreed price of 3 cents per pound, making a total price of \$2,353.54; and defendant purchased and received the same at said price"; that the whole thereof is now due and unpaid, with interest at seven per cent per annum from said date. In a second cause of action it is alleged that, on or about the seventeenth day of September, 1912, defendant took and converted to its own use 454 sweat boxes belonging to plaintiff, which were of the reasonable value of 75 cents each, or a total value of \$340.50; that no part of said sum has been paid, and the same is due and owing from defendant to plaintiff, with interest thereon at seven per cent per annum from said date. Judgment is prayed for \$2,694.24, with interest at seven per cent from September 17, 1912, to date of judgment. The complaint was filed September 27, 1912.

On October 23, 1912, plaintiff filed a first amended complaint. The first cause of action is the same as in the original complaint. The second cause of action is the same as stated in the original complaint except that it is alleged that "said raisins were so delivered and received in 454 certain sweat boxes belonging to plaintiff, of the reasonable value of 75 cents each and which sweat boxes defendant took, applied and appropriated to its own use and benefit," and that plaintiff demanded of defendant a return which defendant failed and refused to do.

On January 13, 1913, plaintiff served and filed a second amended complaint by leave of court. In this amended complaint plaintiff alleged that on or about June 10, 1912, "a certain agreement in writing was made and entered into between the plaintiff and the defendant for the purchase and sale of a certain crop of raisins then owned by the plaintiff, to-wit, all the crop of loose muscatel raisins grown and produced during the season of 1911, upon the ranch of said plaintiff at Las Palmas, Fresno county, estimated in quantity to be about 40 tons at the agreed price of 3 cents per pound, all in accordance with the terms and provisions of said contract, a true copy of which is hereto annexed and marked exhibit 'A' and made part of this amended complaint"; that, by the provisions in said contract, "to-wit, 40 tons L. M., 1911 crop, 3," the parties hereto meant, to wit: 40 tons of loose muscatel raisins of the 1911 crop, price three cents per pound, and was so understood by the parties; that, pursuant to said contract, plaintiff delivered and defendant accepted 78,458 pounds of the raisins therein referred to at the agreed price of three cents per pound, amounting in all to \$2,353.74; that no part of the same has been paid, and there is now due and owing from defendant to plaintiff the said sum of \$2,353.74, with interest from September 17, 1912; that plaintiff has duly performed each and all the provisions of said contract on his part to be performed. In a second cause of action it is alleged that, on or about June 10, 1912, the plaintiff sold and delivered to defendant and defendant purchased of plaintiff 78,458 pounds of loose muscatel raisins at the agreed price of three cents per pound, the reasonable market price thereof; that no part of the same has been paid, and there is now due and owing to plaintiff from defendant \$2,353.74, with interest at seven per cent per annum from September 17, 1912. As a

third cause of action it is alleged that, on or about September 17, 1912, plaintiff was the owner of and entitled to the possession of 454 sweat boxes of the reasonable value of 75 cents each, amounting to \$340.50, and that, on said day, without plaintiff's knowledge or consent, defendant took and appropriated said sweat boxes and all thereof, and ever since has retained and still retains the same to her own use and benefit; that no part of the same has been paid and the whole thereof is due and unpaid. Plaintiff prays judgment for the sum of \$2,694.24, with interest from September 17, 1912, at seven per cent per annum.

In each of the complaints it is alleged that V. A. Mowat was, at all times mentioned therein, transacting business under the fictitious name of Mowat & Co., in which business said V. A. Mowat was the only person interested, and that neither said defendant nor said V. A. Mowat has at any time filed in the office of the county clerk of Fresno County any certificate stating either the name or her place of business, and no such certificate was ever published in any newspaper.

Defendant answered and interposed demurrers to the original and first amended complaints, which need not be further noticed, as the latter were superseded by the second amended complaint.

The contract pleaded is dated June 10, 1912, and is between plaintiff seller and defendant buyer, and states that, "in consideration of the price per pound herein specified, the seller has sold and the buyer has bought the hereinafter mentioned first crop of the seller as follows (estimated by seller):

Quantity.	Variety.	Price.
40 tons	L. M.	8
	1911 crop.	

To be paid for by Sept. 14th, 1912." Buyer to pay "at the price above named when delivery is completed, provided the seller delivers the same thoroughly and properly dried and cured, of good color, in original condition, free from defective fruit or damage of any kind and in good marketable and merchantable condition, at buyer's packing house at Fresno, California, and not later than the — day of — any time after Sept. 1st, 1912 (unless otherwise agreed upon, which seller agrees to do). Provided, however, and it is hereby expressly agreed, that buyer shall not be compelled to receive or pay for any fruit not delivered by the last named

date nor pay for any fruit which exceeds said estimate plus ten per cent. (10%) thereof, nor to receive or pay for any fruit which is not a part of such crop. . . . Buyer shall be entitled to weigh back and reject any portion of crop delivered, not conforming with the terms and conditions of this contract and such rejection by buyer shall not invalidate this contract or release the seller from any of its obligations. . . . This contract is understood by both parties to constitute an absolute sale, but until delivery has been completed, seller agrees to and does assume all risks of loss or damage to any undelivered fruit. . . . Time is of the essence of this contract.

“(Signed) A. BRONGE, Seller.

“MOWAT & Co., Buyer.

“By E. V. FOLEY.”

Defendant served and filed its answer January 23, 1912, and therein denied that plaintiff delivered the raisins mentioned in said contract; alleged that in accordance therewith the raisins were to be delivered, and it was so understood by the parties, after the first and on or before the fourteenth day of September, 1912, and plaintiff failed to deliver the raisins therein mentioned, or any raisins, until said contract had expired, and none was tendered to defendant until September 17, 1912; denied that defendant accepted 78,458 pounds or any number of pounds of raisins at the agreed price of three cents per pound, and alleged that the contract had expired before any raisins were tendered or offered to defendant, and defendant refused to receive or accept the same “and did not receive or accept the same or any thereof”; alleged that “when said raisins were tendered and offered to defendant the same were not thoroughly or properly dried or cured, of good color, in original condition, free from defective fruit or damage of any kind, marketable and merchantable . . . ” but “were wet, sugared, fermented, rotten, decayed and in an unfit condition to be packed or sold”; denied that there is due plaintiff from defendant the sum claimed or any sum. Answering the second cause of action, denied that, on June 10, 1912, or at any time, plaintiff sold and delivered to defendant or that defendant purchased of plaintiff 78,458 pounds or any number of pounds of raisins at the agreed price of three cents per pound or any price per pound; alleged that, during the month of June, 1912, the reasonable value of loose muscatel raisins was not above two and a

quarter cents per pound. Answering the third cause of action, denied that, on September 17, 1912, or at any time, defendant took or appropriated 454 sweat boxes belonging to plaintiff; denied that said sweat boxes were of the value of 75 cents each or of any greater value than 25 cents each; alleged that on said date plaintiff brought to defendant's packing-house a large number of sweat boxes containing raisins; "that defendant's foreman rejected said raisins and refused to accept the same, but that defendant (plaintiff?) requested plaintiff's (defendant's) workmen to unload said sweat boxes and store them so as to save plaintiff demurrage on the cars and that said sweat boxes were unloaded and placed in and around defendant's packing house at plaintiff's request and not otherwise"; that at the time of the unloading of the same defendant "tried to get plaintiff to take the same home, but that he refused to do so"; that defendant has frequently since said date requested plaintiff to remove said sweat boxes but he has neglected and refused so to do; "that plaintiff (defendant?) has never used or claimed said sweat boxes and the same are and have been at all the times herein mentioned under the control and subject to the disposition of the plaintiff."

The cause was tried by the court with a jury and plaintiff had a verdict for \$2,309.59 on which judgment was entered. Defendant appeals from the judgment and from the order denying its motion for a new trial. The pleadings are verified.

Defendant's first assignment of error arises out of the refusal to grant defendant's motion to strike the second amended complaint from the files, made upon the ground that it "states an entirely new and different cause of action from any stated in the prior complaints herein and substitutes an entirely different and new cause of action."

The second amended complaint was served and filed January 13, 1913, and, on January 23, 1913, defendant served and filed its answer thereto. On January 21, 1913, defendant served and filed its motion to strike the amended complaint from the files, noticing the hearing thereof for January 26, 1912. The motion was denied. The cause came on for trial February 27, 1913, and was tried on the issues made by the second amended complaint and the answer thereto. No objection was made at the trial to evidence submitted in sup-

port of this complaint on the ground stated in the motion. The cause was tried upon the merits of the action therein set forth and upon the merits of defendant's view of the transaction as alleged in the answer. Both complaint and answer, as well as the evidence, showed beyond any question or doubt that there was but one transaction in controversy, and that was the alleged sale by plaintiff and purchase by defendant of a certain lot of raisins at a certain price per pound alleged to have been delivered in a certain number of sweat boxes, as to which latter the only dispute was whether or not defendant had appropriated them to its own use and benefit and their value. Even if the original complaint was grounded on an implied contract and the second amended complaint counted on a contract in writing, the facts all related to one and the same transaction, and the relative rights of plaintiff and defendant growing out of that transaction were fully exploited at the trial upon the second amended complaint and defendant's answer thereto. We cannot see how defendant was prejudiced or injured by the action of the court in refusing to strike from the files the second amended complaint. If the ruling was error, still we are not permitted to reverse the judgment on account of it "unless it shall appear from the record that such error . . . was prejudicial, and also that by reason of such error . . . the party complaining sustained and suffered substantial injury, and that a different result would have been probable if such error . . . had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., sec 475.)

Defendant pleaded and at the trial relied upon, and now relies upon, the following defenses: 1. That the raisins were not of the quality or in the condition agreed upon in the contract; 2. That the raisins were not delivered within the time provided in the contract and were never accepted by defendant; 3. That the sweat boxes were never appropriated by defendant, but, on the contrary, defendant notified plaintiff to remove the boxes.

The execution of the contract is not disputed, and the uncontradicted evidence was that the raisins were shipped in two carloads from plaintiff's warehouse on September 17th and reached defendant's packing-house on September 18th, and plaintiff testified that there were 78,450 pounds in the lot.

It appears that the contract was for plaintiff's 1911 crop and was made with plaintiff by defendant through its agent, E. V. Foley, the raisins at that time being in plaintiff's warehouse. Foley testified: "I am a fruit buyer and green fruit shipper, and signed Mrs. Mowat's name to the contract with Bronge. I inspected Bronge's raisins before I bought them. I possibly inspected a dozen boxes on the top of the pile. I dug in five or six boxes of raisins and found them dry raisins. They were uniform in size. I made all the inspection I thought necessary. It depends upon who you are buying from whether you inspect all the boxes in the pile. I didn't examine any other raisins. I made the contract as the result of my inspection and considered what raisins I saw as good merchantable and marketable, good standard raisins."

Plaintiff testified: "They were all the loose muscatel raisins produced on my vineyard during the year 1911. The raisins were standard quality, properly dried, cured the year before, 1911. They were the old raisins. They were in a marketable and merchantable condition. They were delivered in the ordinary sweat boxes. When this action was brought I was returned 150 sweat boxes. I delivered 454, all told, to Mrs. Mowat. The value of these sweat boxes were 55c each. At the time I shipped them to the defendant, they were just bought. No part of the price for the sweat boxes has been paid to me. I demanded the return of the sweat boxes before bringing the action. The only response I got to the demand was I received 150. . . . I was present when the raisins was loaded in September and weighed them off. The raisins were in good condition. There was no difference in the condition of the raisins when they were delivered and when they were examined by Mr. Foley in June."

Witness S. J. Wall testified: "I am a fruit and raisin buyer. I wanted to buy the raisins for Bonner Packing Company and examined them near the latter part of August, 1912. I examined fifteen or twenty boxes and considered them standard raisins. I offered Bronge 2¼c for the muscats. I think they were properly dried and cured, good marketable and merchantable raisins of good color and free from defective fruit."

Witness T. E. Braley testified: "I am engaged in buying and handling raisins. I am familiar with the kinds of raisins produced here, and what are good standard merchantable

raisins. At Mr. Bronge's request, I examined the raisins involved in this suit. I examined ten or fifteen boxes. I took some down and examined the boxes under them. The ones I examined were good merchantable raisins, good standard muscatel raisins, and thoroughly dried and cured."

Bearing somewhat upon the quality of the raisins is the undisputed fact that defendant's employees unloaded and put through the stemmer nearly all of one carload before any question was raised as to their condition. On the other hand, Mrs. Mowat (who constituted the firm of Mowat & Co.) testified that she examined the raisins on September 26th (on her return from Portland, Oregon) and found practically all of them "bad, fermented and sour and partly sugared"; she testified that "they were not standard or merchantable raisins."

Witness Cobleigh was defendant's superintendent in the packing-house. He testified: "The first ones I saw were poor, fermented raisins. . . . The raisins that had been run showed that they were wet raisins, had been mixed in wet and had fermented. The raisins that were stemmed were worth from a quarter to a half a cent less than the market price for standard raisins which was at that time from two to two and a quarter cents a pound." Of the raisins in the second car he testified that he had examined them to "some extent." He testified: "I would not say I had given them a thorough examination." He testified further: "I don't know what time these raisins came in. I was not there at the time. At the time my attention was called to them, the greater part of the raisins in the one car had been unloaded, all but 15 or 20 boxes. Most of the rest had been stemmed, and some of them were still on trucks in the packing house. The second car was still unloaded when Mr. Bronge came in, it was still intact and sealed. I made no attempt to examine them while he was there. I would not accept or reject them."

Witness G. E. Ricker "was Mrs. Mowat's foreman." He testified: "I saw the raisins being weighed in from the first car and put through the stemmer." He testified that the raisins "were rotten." Several other witnesses, some of them raisin growers, testified that the raisins were not standard, merchantable raisins.

We have given enough of the facts upon the question of the quality of the raisins to show that the evidence is sharply

conflicting. It is too well settled to require supporting authorities that where the evidence is conflicting and there is substantial evidence sufficient to justify the finding in question, the reviewing court will not disturb it, and this is true even though the evidence would have justified a finding favorable to the opposing party. There was evidence from which the jury were justified in finding that the raisins were of the quality called for by the contract.

As to the time of delivery the contract is not clear. It provided that the raisins were "to be paid for September 14th, 1912." The provision as to delivery is incomplete. It reads: "not later than the — day of — any time after Sept. 1st, 1912 (unless otherwise agreed upon), which seller agrees to." It then provides "that the buyer shall not be compelled to receive or pay for any fruit not delivered by the last named date. . . . Time is of the essence of this contract." On Saturday, September 14, 1912, plaintiff wrote defendant that he had been busy shipping malagas and "delayed in delivering 1911 raisins, but," he wrote, "having spare men and teams now I shall load these raisins (two carloads) on Monday next, and you may expect them the day after." They were loaded the 16th, shipped the 17th, and arrived at defendant's packing-house the 18th. One car was unloaded and the raisins run through the stemmer before any objection arose, and the objection was to the quality and not to the delay in delivering them. That question was not raised until the return of Mrs. Mowat. On September 26th she wrote plaintiff: "On my arrival home I found your raisins were delivered during my absence, after the expiration of your contract, though I left positive instructions not to take in any raisins after the expiration of contract. Several tons had been stemmed, when part of these raisins were found to be badly fermented and sugared, and unfit for human consumption." After calling plaintiff's attention to the provision—"Payment to be made by September 14th," she adds "which presupposes delivery to have been completed by that date. Mr. Foley in writing out your contract omitted to state, 'delivery to be completed by fourteenth.' . . . We, therefore, reject on quality, and also refuse to take because contract had expired when delivery took place."

Mr. Foley testified that when he and plaintiff were arranging the terms of the contract the time of delivery came up and

plaintiff told him he could ship them on the 1st of September and that defendant could pay September 14th, as Mrs. Mowat "would be back by that time. He said it would be all right. Q. Did he say anything about what time he could ship them? A. Not at that time, only he said he would ship them at any time after the first of the month. Q. Was there anything said in that connection in regard to his shipping them in time to be disposed of by the 14th? A. The only thing I remember of, I told him she would be able to finance herself and move raisins and pay for them by the 14th."

Considering all the circumstances, together with the failure to express a definite date for the delivery of the raisins, we think the jury were justified in finding that there was no violation of the terms of the contract so far as the time of delivery was concerned.

The question of acceptance remains. We have stated Mr. Cobleigh's testimony in part when he discovered the condition of the stemmed raisins. He testified further: "I called Mr. Bronge up on the telephone before noon (the day the raisins were stemmed) and told him there were rotten raisins in the lot. He came in after dinner, and I showed him the raisins that were scattered through the boxes, and told him that it would be impossible to accept anything like that and he asked me how many there were and we had one truck load saved out, loaded, and some on the floor. He mentioned an adjustment and I told him Mrs. Mowat was away, and that I would not make any adjustment but leave it up to her when she returned. Mr. Bronge said he knew there were two boxes that were a little off; otherwise, supposed the whole lot was first class. When I showed them to him, he said he was not aware that they were that way—in that condition." He testified that the result of the meeting was that the other car was to be unloaded at plaintiff's request to save demurrage and "he agreed to let things rest until Mrs. Mowat returned. I refused to unload them on any condition. I did not accept nor reject that car of raisins."

As to this conversation plaintiff testified: "I had a conversation with Mr. Cobleigh on the 19th of September, 1912, in regard to the raisins which he showed me at that time. I did not make the statement to him in that conversation that if I had known the raisins were in the condition they were in, I would not have sent them in. The raisins were not damaged

at all. One car had not been unloaded at that time. Part of the other car had not been unloaded. Mr. Cobleigh did not tell me that he would not take the raisins—that they were not in good shape. He did not tell me that they were wet, sugared, and had fermented, and that he would not take them. He proposed to unload the remaining sweat boxes to save me demurrage on the car. I did not urge him to do it. He did not unload them at my request. I did not ask him to place them on the porch so as to get them out of the car. No conversation of that kind took place at all at that time and place. He showed us the raisins about half-past 11. We came in the afternoon. He said the raisins were too heavy and sticky. There were nine boxes left in the car that were unloaded. The others had gone through the stemmer and stemmed out. He showed us the raisins, and argued the point. He said he would not unload the other car. I said that he had to unload the car because it was part of the shipment of the other car. It was one order, that was all. That is everything that was said between Mr. Cobleigh and I. I did not examine the raisins that were stemmed. I examined the ones that were unloaded. Only examined those that they had in the car. Nine boxes had not been unloaded. I did not admit to Mr. Cobleigh that the raisins were not up to standard. I didn't have an understanding with Mr. Cobleigh that the remaining part of the car would be unloaded and try to adjust the matter with Mrs. Mowat when she came back from 'Frisco. There was nothing said about my adjusting the matter of the damaged raisins with Mrs. Mowat. I didn't tell Mr. Ricker at the packing house that if I had known the condition which the raisins were in, I would not have shipped them."

It seems to us that, having shown that the raisins were such as called for by the contract and were delivered on time, it became defendant's duty to accept and pay for them. Plaintiff was not required to prove more, and acceptance was made out unless the jury were compelled from the evidence to find that plaintiff admitted the inferiority of the raisins and agreed to adjust the matter on the assumption that the raisins were not up to standard. We cannot say that the jury were under any such compulsion. The jury had the right to believe plaintiff when he denied having admitted or said what witness Cobleigh testified to. Upon this point error is claimed because the court gave the following instruction: "And you

are further instructed that the evidence is without contradiction in this case that the raisins in question were tendered to defendant, who thereupon accepted a portion thereof. If you believe such evidence and so find then the court instructs that the defendant is estopped from claiming that such raisins were not delivered on time." This instruction defendant claims is error and was prejudicial because by it "the jury are told that the evidence showed without contradiction that the defendant accepted a portion of the raisins," whereas it "was a question which should have been submitted to the jury." Attention is called to the concluding paragraph of the instruction which states, "if you believe such evidence," i. e., the evidence which the court said was uncontradicted, "the defendant is estopped from claiming that such raisins (all of them) were not delivered." We do not think, in view of all the evidence, that the court was justified in instructing the jury that defendant accepted a portion of the raisins. The only evidence on that point was that a portion was unloaded and run through the stemmer in the absence of the superintendent who, as soon as his attention was called to it and while the work was going on, stopped stemming and immediately called up plaintiff, who came at once to the packing-house. The unloading and stemming of these raisins was a strong circumstance indicating acceptance of the raisins taken from the car, but under the circumstances it was not conclusive, and the court was not justified in telling the jury that the evidence of acceptance was uncontradicted, thus taking the fact away from the jury. But the jury found, on sufficient evidence, as we have held, that all the raisins were of the quality required by the contract and that plaintiff tendered them on time; defendant was therefore liable whether it accepted or rejected the raisins. Hence, the instruction was without prejudice.

Defendant was refused the following instruction: "You are instructed that the raisins received into defendant's packing-house were received after the contract had expired and if said raisins were received under a mistake of fact as to their quality or condition, then defendant is not liable for their value as per the contract, but only for the market value of raisins of that kind at that time."

The raisins were delivered in time, so the jury found, though a few days after September 14th, and there was no

claim made in the answer and no evidence in support of a claim that the raisins were received by mistake. It was not error to refuse the instruction.

Instructions marked 12 and 13, offered by defendant, were refused. They were as follows:

"12. Should the jury believe that according to the terms of said contract, and the intention of said parties, said raisins were to be delivered before the 14th day of September, 1912, and they were not, as a matter of fact, delivered or offered to be delivered until the 17th day of September, 1912, then as to the raisins rejected and not accepted by defendant, your verdict should be for the defendant.

"13. Should the jury find that the delivery of the raisins was not accepted by defendant or its agents, but that said raisins were unloaded from said cars at defendant's packing house at plaintiff's request and for his accommodation to save demurrage, and to await the return of Mrs. Mowat, then, in that case, plaintiff cannot recover in this action, and you must find a verdict in favor of the defendant."

Number 12 ignores the consideration of evidence tending to show that even if the intention was as claimed by defendant the condition was waived. Number 13 is based upon a condition of facts which if found by the jury would have required a verdict for defendant. The facts were found against defendant. We discover no error in refusing the instructions.

As to the alleged conversion of 454 sweat boxes less 150 returned, the evidence is slight. Plaintiff testified: "When this action was brought I was returned 150 sweat boxes. I delivered 454 all told to Mrs. Mowat. The value of these sweat boxes was 55 cents each. . . . No part of the price has been paid me. I demanded the return of the sweat boxes before bringing the action. The only response I got to the demand was I received 150. . . . They were brand new sweat boxes in November, 1911, when the raisins were put on them. . . . The 150 sweat boxes were returned to me the latter part of October."

In the letter sent by Mrs. Mowat, September 26, 1912, she said: "Please call and remove your goods at the earliest convenience and greatly oblige, Yours, etc." She testified: "Mr. Bronge never asked me for the boxes; never made a demand on me for them. I wrote him a letter in regard to

his taking the boxes—the one introduced in evidence this morning.” (The letter said “goods” not “boxes.”) On cross-examination she testified: “Mr. Bronge never made a demand upon me either verbal or written for the boxes.” The plaintiff in his testimony does not say upon whom or when he made a demand for the boxes, except that it was before the commencement of the action. The contract is silent on the subject and there is no evidence as to custom. Plaintiff was to deliver the raisins and did so in boxes. There was no obligation on defendant’s part to return them to plaintiff’s warehouse. Defendant’s obligation was to deliver them to plaintiff when called for. Plaintiff testified that he made a demand for the return of the boxes and, though Mrs. Mowat testified that no demand was made upon her, it is fair to assume that it must have been made upon some person authorized to deliver them, for plaintiff got 150, and this, he testified, was the only response he got to the demand. It was within defendant’s power to explain what became of the boxes for they were in its possession and control. The verdict was for \$2,309.50, which is less than the contract price for 78,450 pounds of raisins, the amount plaintiff testified he delivered. If the jury allowed anything for the boxes, we cannot say they so found without any substantial evidence.

Some assignments of error are made arising out of rulings of the court upon the admission or rejection of evidence. Objection was made to plaintiff’s offer of testimony as to a certain transaction between plaintiff and defendant’s agent, Foley, occurring prior to the execution of the contract. It appeared from the record that, after making a motion to strike out the testimony, defendant’s counsel withdrew the motion. This removed the sting from the objection.

When plaintiff was testifying, his counsel said to him: “Did Mrs. Mowat say anything to you about paying for these raisins?”—referring to a conversation had in her office. Objected to as irrelevant and incompetent and because on his cross-examination “Mr. Bronge denied that he ever had any conversation with Mrs. Mowat on that subject. Mr. Cory (attorney for plaintiff): He certainly testified to some conversation with Mrs. Mowat. The Court: Well, if it is relevant I will hear it; and if it is not relevant, make a motion to strike it out. Mr. Cory: Answer the question. Relate the conversation with Mrs. Mowat. (Question read.) A. Mrs.

Mowat offered us to pay us the market price of two cents for those muscat raisins, or, if we didn't accept, to keep us five years in court. Of course, we didn't like the remark, and we walked out." An exception was noted but no motion made to strike out the answer. Subsequently Mrs. Mowat was called as a witness and defendant sought by her to show what the conversation above referred to was. "Q. Did you in that conversation say anything, you or Mr. Bronge or anyone else, in regard to these raisins that are involved in this suit? A. Yes. Q. What was said? A. I don't remember as to who brought up the conversation. I may have done so, but I said that it was too bad to have a lawsuit over a matter that might be settled out of court; that if it went into court it might be in court for years, and that I was willing to pay a fair market price for the few tons of raisins that had been actually stemmed out by my employees during my absence when he sent them in, but as to the rest of them I would not consider them at any price, as they were not merchantable, could not be shipped out, were not fit for human food." Plaintiff objected and moved to strike out the answer. "There is no statement of Mr. Bronge, those were statements in favor of the witness, and also an attempt to compromise pending litigation. The Court: I rather expected for you to object to that as a matter of compromise, and that it couldn't be given, anything of that kind, because the court desires that there should be a compromise of all disagreements. I think the motion should be granted. Mr. Aynesworth (defendant's attorney): Because they put it in themselves, can they object to Mr. Bronge's reply? The Court: It doesn't follow that because one thing was wrong, the other ought to be allowed. Two wrongs do not make a thing right." That meeting of the parties was brought about to effect an adjustment of their differences, as appears from the record. Plaintiff's testimony should not have been allowed, but the court permitted the witness to answer with the understanding that if not relevant a motion might be made to strike it out. This, however, was not done and the answer stood. We cannot say the court erred in cutting off further testimony as to what was said in the effort to adjust existing differences. Offers of compromise are not necessarily admissions that the claim or defense is lacking in merit; and such offers are not in general admissible. (Jones, Law of Evidence, sec. 293.)

Continuing her examination, she was asked whether in that conversation Mr. Bronge made "any statement to you at the time (as to the time?) of the delivery of the raisins. A. I asked them why they delivered them or attempted to deliver them after their contract had expired, and they answered—The Court: You mean Mr. Bronge? A. Mr. Bronge and also Mrs. Bronge. They said: 'Well, why did you men touch them, we sent them—if we sent them in after the contract had expired, why did they touch them?'" On motion of plaintiff the answer was stricken out.

The contract was before the jury and also the undisputed fact that the raisins were delivered three days after the date claimed by defendant for the delivery. The contract, we have seen, was not clear on the point. The answer cast no light upon the matter and was not responsive to the question; besides, it was part of a conversation had in the effort to compromise. We cannot see that the ruling was prejudicial. Later on Mrs. Mowat was asked what Mr. Cobleigh's authority was, the purpose being to show that he had no authority to accept the raisins or to accept raisins tendered after the contract had expired. The court ruled that defendant could show that Cobleigh rejected the raisins but could not show that he had no authority to accept the raisins. The undisputed fact was that Cobleigh was defendant's superintendent and in full charge of her business at the packing-house in her absence; that he assumed to act in the matter as such superintendent. Under the circumstances shown in this case we do not think that defendant could evade responsibility by showing want of authority in her superintendent.

We have noticed all the assignments of error which seem to call for consideration and discover no ruling justifying a reversal.

The judgment and order are affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 13, 1916.

[Civ. No. 1583. First Appellate District.—January 15, 1916.]

**E. T. B. MILLS, Appellant, v. GEORGE A. MOORE & CO.,
Respondent.**

CONTRACT—AGENCY FOR SALE OF GRAIN BAGS—RECOVERY OF COMMISSIONS—PERFORMANCE OF AGREEMENTS—SUFFICIENCY OF EVIDENCE.—

In this action to recover certain commissions alleged by the plaintiff to be due him from the defendant under certain oral contracts, by which the latter agreed to constitute the former its agent for the sale of grain bags, it is held that the trial court did not abuse its discretion in setting aside its decision in favor of the plaintiff and granting the defendant a new trial, in view of the infirmities of the proof and of the entire evidence as to whether the plaintiff had sufficiently performed his part of the agreements as to keeping the defendant informed as to the conditions and doings of the market in grain bags, and to furnish defendant with confidential information, which plaintiff was not to furnish other persons in the same line of business, and to inform defendant of the prices at which bags were offered and quoted to plaintiff in order to give the defendant the first opportunity to sell and to give said defendant the preference in all sales.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. Adolphus E. Graupner, Judge.

The facts are stated in the opinion of the court.

Samuel T. Bush, and Barnett Lyon, for Appellant.

Denman & Arnold, for Respondent.

RICHARDS, J.—This is an appeal from an order granting the defendant's motion for a new trial.

The action was brought to recover judgment for certain commissions alleged by the plaintiff to be due him from the defendant under certain oral contracts, by which the defendant agreed to constitute the plaintiff its agent for the sale of grain bags. The issues presented by the pleadings related to the time these contracts were entered into and their terms, but the chief question presented at the trial and upon the motion for a new trial was as to whether plaintiff had sufficiently performed his part of these agreements so as to be

entitled to recover his commissions. Upon this issue the findings of the trial court were in favor of the plaintiff, but these were assailed upon the motion for a new trial as not sufficiently supported by the evidence in the case, and in granting the motion for a new trial the court evidently adopted this change of view.

We are unable to say that the court was in error in so doing. The first oral agreement, which the court found the parties to have entered into in February, 1910, and which was modified in certain other respects by the second oral agreement of April, 1911, provided that the plaintiff was to keep the defendant informed as to the conditions and doings of the market in grain bags, and to furnish defendant with confidential information which plaintiff was not to furnish other persons in the same line of business, and to inform defendant of the prices at which bags were offered and quoted to plaintiff in order to give the defendant the first opportunity to sell and to give said defendant the preference in all sales. The plaintiff relied upon his own testimony as showing that these provisions of his contracts had been complied with. A reading of the plaintiff's testimony upon the extent of his performance of these portions of his agreements will show that the trial court might well have entertained grave doubt as to the sufficiency of this evidence upon the maturer consideration of it which the motion for a new trial afforded. For example, the plaintiff testifies: "I agreed to post him on the market at all times and give him an opportunity to make sales, and I did so *when I thought it was a case he could meet.*" And again, "If I thought he could fill them, if he was in position, I would bring him offers; it all rested with me. He was glad to take what I gave him." And yet again, "I could not say whether I gave him every bid; I gave him a chance at every trade *where I thought he could fill it.*"

In the light of the evident infirmities of this proof and of the entire evidence in the case, we think the trial court did not abuse its discretion in setting aside its former decision and in granting the defendant a new trial.

This view renders unnecessary a consideration of the other points presented upon this appeal.

The order is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1739. First Appellate District.—January 18, 1916.]

**COOS BAY MANUFACTURING COMPANY, Respondent,
v. CALIFORNIA SELLING COMPANY, Appellant.**

SALE OF BOX SHOOK—LIABILITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.—Where, in an action for the recovery of a sum of money for the sale and delivery of certain "box shook," it is shown that the factory of the corporation in the name of whom the goods were ordered and shipped was destroyed by fire prior to the time such order was given, and not rebuilt, and that at the time of the giving of such order about all that such corporation had left was its labels and its reputation for packing, and shortly before the giving of such order a new corporation was formed by the persons interested in the former corporation, which took over its offices, made a payment on account of the shook, and made resales thereof in its own name, a judgment against the new corporation is warranted.

ID.—EVIDENCE — INSOLVENT CORPORATION — RECORD OF ACTION.—The record of an action brought in the year of the transaction in question against the corporation in whose name the goods were ordered, by one of its creditors, and which showed execution issued and returned unsatisfied, is properly admitted in evidence as tending to show the insolvent condition of such corporation at that time.

ID.—WITNESSES—RIGHT OF PARTY CALLING TO IMPEACH.—There is no error in permitting the plaintiff to impeach the testimony of the president of the corporation in whose name the goods were ordered, notwithstanding he was called as a witness by the plaintiff, where it is shown that such witness was the vice-president and principal stockholder of the corporation, which was the real beneficiary in the transaction.

ID.—WITHDRAWAL OF OBJECTION TO EXCLUDED EVIDENCE—WAIVER.—The defendant cannot complain on appeal of the procedure of the trial court after submission of the cause in admitting certain evidence offered by the defendant during the trial and excluded upon objection of the plaintiff, where plaintiff's counsel orally notified defendant's counsel of its withdrawal of such objection prior to its request to the court to make the order, and immediately thereafter notified defendant of such order, and the defendant took no action in the premises, notwithstanding the cause remained undecided for twelve days thereafter, and defendant made no reference thereto in its motion for a new trial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Eugene P. McDaniel, Judge presiding.

The facts are stated in the opinion of the court.

Wise & O'Connor, for Appellant.

A. P. Dessouslavy, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in plaintiff's favor and an order denying defendant's motion for a new trial. The action was brought against the California Selling Company, Sunnyvale Canneries, Napa Valley Improvement Company, Napa Valley Packing Company, corporations, and against George H. Hooke and Julius Wolff, defendants, to recover the sum of \$7,872.02, alleged to be due from said defendants for certain "box shook" sold and delivered to them. The answer of the defendants was in the form of a general denial. Upon the trial the plaintiff dismissed the action against all of the defendants except California Selling Company, the appellant herein, and recovered judgment against it for the full amount of its claim.

The first contention of the appellant is that the evidence is insufficient to justify the decision of the court. The evidence discloses that the box shook in question was ordered from the plaintiff by and in the name of the Napa Valley Packing Company, and was shipped to it and was charged upon the books of the plaintiff to the said Napa Valley Packing Company.

The facts upon which the plaintiff relies to sustain its judgment against the California Selling Company are substantially as follows: The Napa Valley Packing Company was organized as a corporation in 1901 for the purpose of canning, preserving, packing, handling, and dealing in fruits, vegetables, etc., and for some years it owned and operated its own packing-house, and preserved and handled these products under its own labels, and had an established line of customers and of trade. In the year 1908 its factory was destroyed by fire and was not rebuilt, and at the close of that year, according to the testimony of Mr. Hooke, about all that the Napa Valley Packing Company had left was its labels and its reputation for packing. The California Selling Company was organized as a corporation in the latter part of the year 1908, with George H. Hooke, Julius Wolff, and Mary L. Baraty as its organizers and stockholders. Mr. Hooke was made presi-

dent; Mr. Wolff, who was the president of the Napa Valley Packing Company, became vice-president and manager, and Mary L. Baraty, who had also been secretary of the Napa Valley Packing Company, became secretary of the new corporation. The former offices of the Napa Valley Packing Company were taken over by the California Selling Company, who paid the rent thereafter, although the former occupant still maintained desk room there and had its name on the door. In the early part of 1909 the order for the box shook was placed with the plaintiff by Mr. Wolff in the name of the Napa Valley Packing Company, and the material was received in due course. There were two payments made on account of this order, one of \$464.31 in August, 1909, and another of \$560 in September, 1909. It does not appear by whom the first of these remittances was made, but the second was by the check of the California Selling Company. While the material was in the course of delivery several letters passed between the California Selling Company and plaintiff, in one of which the order for this material was referred to as "our contract." The box shook when received was sent out in lots as ordered to various packing-houses, and in several specifically proven instances was billed by and shipped as the property of the California Selling Company, and was paid for in checks drawn to it. During the year 1909 the Napa Valley Packing Company, according to the testimony of Mr. Hooke, had no credit, and for that reason its name did not appear on the books of the California Selling Company, and whatever business the latter company did with it was done in the name of Mr. Wolff, the president of the one and the vice-president and manager of the other corporation. There was also offered in evidence the record of an action brought in that year against the Napa Valley Packing Company by one of its creditors to recover a considerable sum of money, in which judgment was had against it, and an execution issued which was returned unsatisfied. The defendant objected to this evidence, and now complains of its admission as error, but we are of the opinion that it was admissible as in some degree tending to show that the Napa Valley Packing Company was at the time in a practically insolvent condition.

From the foregoing, and from other more or less direct evidence not necessary to be recapitulated, the court arrived at the conclusion that the transaction with the plaintiff, while

apparently undertaken in the name of the Napa Valley Packing Company, was in reality a transaction in which the California Selling Company was the real actor and beneficiary, and that the name of the Napa Valley Packing Company was merely a cover or designation under which it and its organizers were doing business during the year 1909. We think this conclusion is abundantly sustained by the proofs, and hence that the appellant's first contention that the evidence does not justify the decision of the trial court is without merit.

The appellant further contends that the trial court committed an error in permitting the plaintiff to attempt to impeach the testimony of Mr. Hooke, called as plaintiff's witness, by reference to a deposition of the latter, in which it was claimed he had given other and contradictory evidence to that elicited from him during the trial. The appellant urges that the plaintiff should not have been permitted to impeach its own witness; but we think that the record sufficiently shows that the witness Hooke was so identified with the California Selling Company as its president and principal stockholder at the time this debt (if it was its debt) was incurred as to make him clearly such a witness as the plaintiff might feel obliged to call, but by whose testimony it should not be bound. In addition, however, it appears that at a later stage of the case the entire deposition of Hooke was put in evidence by stipulation of the parties, and thus the error, if any occurred, was rendered immaterial, if not altogether cured.

The appellant has a further objection to the ruling of the court in refusing to permit the witness Hooke to answer certain questions put to him by the defendant upon cross-examination, as calling for the conclusion of the witness. We are of the opinion that the answers to these questions were properly excluded upon that ground.

Upon oral argument of this cause upon the appeal the main contention of the appellant was that the court committed an error of procedure during and after the trial of the cause which must result in its reversal upon appeal, and which arose in the following manner: During the course of the trial the defendant offered in evidence a number of letters which the witness Hooke stated had been taken by him from the files of the Napa Valley Packing Company, and by which letters the defendant offered to prove that the Napa Valley Packing Company, during the period covered by the transaction

with the plaintiff, was conducting a considerable business, and had dealings with parties in several states in the sale of corn and canned goods and in the purchase of box stock. It also offered in evidence the bank-books of the Napa Valley Packing Company as indicating the amount deposited by that company during the year 1909, and as showing that during that period it was a going concern. To both of these offers the plaintiff objected upon the ground that they were incompetent, irrelevant, and immaterial, and the court sustained this objection. On April 30, 1913, the cause was submitted to the court for decision upon briefs thereafter to be presented. After the submission of the cause, and either on the same day or the following day, plaintiff's counsel orally notified defendant's counsel that plaintiff withdrew its objection to the admission in evidence of the said correspondence and bank-books, and that it consented to the admission thereof in evidence, to which the defendant's counsel replied that he would not consent to the admission of such testimony and that he was satisfied with the record as it stood. Thereafter, and on May 5, 1913, without any further notice to attorney for the defendant, but prior to the decision of said cause, the court, upon the request of plaintiff's counsel but without the presence of counsel for defendant, made an order reciting that counsel for plaintiff having appeared and withdrawn its objection to the introduction of the above-mentioned evidence, the ruling of the court would be reversed and the evidence admitted, and when produced would be properly marked as the defendant's exhibits, and that said order was made *nunc pro tunc* as of the date of the former ruling and prior to the submission of the cause. Plaintiff's counsel immediately notified defendant's counsel of the making of said order. Thereafter, and on May 17, 1913, the court decided the case, and in its findings expressly stated that in considering the evidence in the case it had also considered the foregoing evidence which had been admitted after the plaintiff's objection had been withdrawn. The judgment of the court was in plaintiff's favor, and thereafter the defendant in due time served and filed its notice of intention to move for a new trial, wherein it specified as errors of law the rulings of the court in at first refusing to admit the foregoing evidence, and also specified as error the subsequent order of the court admitting the same in evidence in the absence of the defendant and without pre-

vious notice of the making of said order. Upon this appeal from the order of the court denying its motion for a new trial the appellant insists that the action of the court in reference to the foregoing matters was entirely irregular; that it was entitled in the first instance to have had the correspondence and bank-books of the Napa Valley Packing Company admitted in evidence for the purposes for which they were offered; that the offer of plaintiff's counsel orally made to defendant's counsel to withdraw its objection to this evidence and consent to its admission made after the submission of the cause, and their subsequent appearance in open court, but without the presence of the defendant or notice to it of such action, to withdraw their objection to the evidence, and the order of the court made thereon admitting the same, and the statement of the court in its findings that it had duly considered such evidence, did not operate to cure the prior error and irregularity of the court's action, and hence that the cause must be reversed therefor upon this appeal.

Conceding, for the sake of argument, though not deciding in the absence of the evidence itself from the record, that the original ruling of the court in refusing to admit the said correspondence and bank-books of the Napa Valley Packing Company in evidence in the first instance was erroneous, we are of the opinion that such error, if any, was sufficiently cured by the subsequent acts of the parties and proceedings of the court; for it appears that on the very day of the submission of the cause or on the following day, and while the cause, though under submission, was still in legal contemplation on trial (*Dore v. Southern Pacific Co.*, 163 Cal. 183, 195, [124 Pac. 817]), the plaintiff notified the defendant of the withdrawal of its objection to the admission of this evidence. Where this offer was made does not appear, and for aught that the record discloses it may have been in open court. However that may be, it seems to us plain that in the presence of this offer, which was the equivalent of an offer to reopen the case for the admission not only of this particular evidence but of such further proofs of a like nature as the defendant might wish to present, the defendant was not entitled in all fairness to refuse the offer, or to sit back in reliance upon a possible error in the record which it might use to work a reversal of the case upon appeal, and the fact that the case was under submission at the time of such offer and

of its refusal does not, in our opinion, change the rule as laid down very recently by the supreme court in the case of *Estate of Ross*, 171 Cal. 64, [151 Pac. 1138], wherein the court says with respect to a state of facts not essentially dissimilar from those in the case at bar: "Before the close of the trial counsel for the respondents withdrew all objections of this character, and offered to allow the appellant to recall the witnesses and elicit from them fully the reasons and bases of their respective opinions, to which offer counsel stated that while they thanked opposing counsel for the splendid offer they preferred to stand upon the record as made. If counsel truly desired to have further evidence upon this subject introduced they should have availed themselves of this opportunity, and should have recalled the witnesses accordingly. It does not appear that there would have been any difficulty in doing so, or that the court refused to allow it to be done. The record indicates that the court would have allowed it. If, on the other hand, they desired to preserve the ruling in the record for the purpose of thereby securing a ground upon which to obtain a new trial or reverse the order on appeal to this court, it need scarcely be said that we will not entertain the objection under those circumstances. In either alternative the objection must be deemed to have been effectually waived." (*Estate of Ross*, 171 Cal. 64, [151 Pac. 1138]; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 690, [46 Pac. 738]; *Kahn v. Trieste-Rosenberg Co.*, 139 Cal. 340, 346, [73 Pac. 164]; 38 Cyc. 1462, and cases cited.) It is true that, as the record discloses, the action of the plaintiff in suggesting to the court that its objection to the admission of the evidence in question was withdrawn was taken, and the order of the court in admitting said evidence was made, in the absence of the defendant and without prior notice thereof other than that theretofore orally given, but the record also shows that the defendant was immediately thereafter notified of such action and order; the cause was still under submission and undecided, and so remained for a period of twelve days after such notification, during which the defendant had ample opportunity to take such action as it might be advised with reference to such order and to the reopening of the case for further evidence of a like nature if such was desired. No such action was taken, and when after the court's decision a motion for a new trial was made by the defendant, it did not specify among the grounds

of such motion either misconduct of the court in the making of this order or accident or surprise by which it was prevented from having a fair trial; nor did it set forth or suggest the existence of other evidence which for any reason it was prevented from introducing at the former trial. Under these circumstances we think the appellant is no longer in a position to urge upon this appeal the alleged error or irregularity in the action of the trial court in respect to the matters above set forth.

Judgment and order denying a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 16, 1916.

[Civ. No. 1585. First Appellate District.—January 21, 1916.]

**WAINARD G. HERRICK, Respondent, v. OAKLAND
MOTOR COMPANY et al., Appellants.**

NEGLIGENCE—PERSONAL INJURIES—PLEADING.—While it is permissible to plead negligence in general terms, specifying the particular act or acts upon which the pleader relies as constituting such negligence, this rule applies only to cases where the acts as alleged might or might not have been negligently done, and has no necessary application to a case wherein the facts complained of and specifically set forth are such that the inference of negligence necessarily arises from their enumeration.

Id.—COLLISION OF AUTOMOBILE AND MOTORCYCLE—SUFFICIENCY OF COMPLAINT.—In an action for damages for injuries received in a collision between an automobile and a motorcycle, where the complaint alleges that plaintiff was riding southward along the westerly side of a certain avenue and near the southerly side of an intersecting street, where he had a right to be and to ride, and the defendants, operating an automobile, were proceeding northerly along the easterly side of the avenue, and suddenly, without warning, altered the course of the automobile and drove it with high speed and without any warning or notice across said avenue to the westerly side thereof, near the southerly side of the street, where the plaintiff rightfully was, and there struck and injured him, the inference of negligence from the facts is logical and irresistible, and it was not necessary to aver that they were negligently done.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

John Ralph Wilson, for Appellants.

Sullivan & Sullivan, and Theo. J. Roche, for Respondent.

THE COURT.—This is an appeal from a judgment in plaintiff's favor in an action for damages arising out of a collision between the defendants' automobile and the plaintiff's motorcycle. The appeal is upon the judgment-roll, and the only question presented for determination is as to whether the complaint states a cause of action.

The complaint alleges that upon the sixteenth day of August, 1913, the plaintiff was riding and operating a motorcycle in a southerly direction along the westerly side of Van Ness Avenue in the city and county of San Francisco, and that the defendants were operating an automobile in a northerly direction along the easterly side of Van Ness Avenue; and that "when said plaintiff, riding and operating said motorcycle as aforesaid, reached a point on said southerly side of Van Ness Avenue near the southwest corner of Van Ness Avenue and Jackson Street, said defendants, without any notice or warning of any kind to said plaintiff, with great speed and rapidity altered the course of said automobile, proceeding in a northerly direction along the easterly side of said Van Ness Avenue from said easterly side of said Van Ness Avenue toward the westerly side of said Van Ness Avenue, and drove said automobile into and against said plaintiff, riding and operating said motorcycle as aforesaid, then and there throwing him to the ground and inflicting upon him severe personal injuries."

It is the defendants' contention that the foregoing averments of the plaintiff's complaint do not state a case of actionable negligence, for the reason that it is nowhere set forth therein or elsewhere in said complaint that the alleged acts of defendants were negligently done, nor that they constituted such negligence on their part as to give rise to a cause of action. It is further contended by the appellants that the inference of negligence does not arise from the facts which are set forth in said complaint.

We are of the opinion that neither of these contentions is to be sustained. It is quite a well-settled rule of pleading in this state that in actions for negligence, while it is permissible to plead negligence in general terms, specifying the particular act or acts upon which the pleader relies as constituting such negligence, this rule applies only to cases where the acts as alleged might or might not have been negligently done, and has no necessary application to a case wherein the acts complained of and specifically set forth are such that the inference of negligence necessarily arises from their enumeration. (*Silveira v. Iverson*, 125 Cal. 266 and 269, [57 Pac. 996].) Such, in our opinion, is the case at bar. The plaintiff was riding southward along the westerly side of Van Ness Avenue and near the southerly side of Jackson Street, where he had a right to be and to ride. The defendants, operating an automobile, were proceeding northerly along the easterly side of Van Ness Avenue. Suddenly, without warning, the course of their machine is altered, and it is driven with high speed and without any warning or notice across said avenue to the westerly side thereof, near the southerly side of Jackson Street, where the plaintiff rightfully was, and there struck and injured him.

The inference of negligence from the foregoing facts is logical and irresistible. (*O'Connor v. United Railroads*, 168 Cal. 43, 47, [141 Pac. 809].) It was not necessary, therefore, to aver that they were negligently done.

Judgment affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 20, 1916.

[Civ. No. 1593. First Appellate District.—January 21, 1916.]

DAVID SALFIELD, Respondent, v. HERMAN COHN,
Appellant.

CONTRACTS—ARCHITECT'S SERVICES—DRAWING OF PLANS—SUFFICIENCY OF EVIDENCE.—In an action to recover for services of an architect in drawing plans for a house, where the plaintiff testified that the preparation of the plans and the making of changes thereafter were at the request of the defendant, but the testimony was radically conflicting as to what the agreement was between the parties, the decision of the trial court in favor of the plaintiff will be upheld on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George E. Crothers, Judge.

The facts are stated in the opinion of the court.

James P. Sweeney, for Appellant.

tum Suden & tum Suden, for Respondent.

THE COURT.—This is an appeal from a judgment in favor of plaintiff and from an order denying a new trial.

The only question involved is the question as to whether the evidence sustains the findings and judgment of the court.

Mr. Sweeney (for Appellant): That is the only question.

The Court: This was an action brought by an architect to recover certain sums alleged to be due for a number of plans which he had drawn for the defendant, who was the owner of a lot upon which, apparently, he desired to build a house. Upon the trial of the case the two chief witnesses presented were the plaintiff and the defendant; and the question to which their testimony was directed was as to the oral agreements which had been made between them with reference to these several plans, and the understandings at the time this, that, or the other plan was found to be insufficient or impracticable for the uses of the defendant. The testimony is radically conflicting as to what the agreement was between the parties. The court apparently saw fit to adopt the version which the plaintiff gave of the understanding between the

parties, and based its findings and judgment upon its acceptance of the plaintiff's testimony. Will it not be conceded by you that the plaintiff's testimony went to the extent of supporting his claim for the amount which he claimed to be due in case the court believed it?

Mr. Sweeney: Yes, in a way. If the court had believed his testimony, it should have given him a great many thousand dollars more than it did; but it is the contention of the defendant that he always told the plaintiff that he wanted plans for a twenty-five thousand dollar building or a twenty-five thousand five hundred dollar building. There is absolutely no conflict upon that pivotal point throughout the entire case.

The Court: We think that the record discloses that the plaintiff testified that at the time these several plans were drawn and examined there were various directions given him by the defendant as to the kind of plans he wished, and as to the cost of the building which was to be constructed. We recall, for example, that when the second set of plans was prepared—which showed a building worth something like twenty-six thousand dollars or twenty-seven thousand dollars—the defendant thereupon directed the plaintiff to make certain additions and changes in the plans, which brought the cost up to something like thirty-five thousand dollars, and that he prepared a set of plans in accordance with the suggestions of the defendant; and that after they were prepared the defendant found that he was unable to borrow the money to erect the building according to this plan, and thereupon other plans were directed to be drawn.

Mr. Sweeney: Yes.

The Court: In other words, isn't this the situation: that repeated plans were drawn by the plaintiff at the request of the defendant, and repeatedly modified because the defendant did not feel that he had money enough to meet the requirements of the plans as prepared by the plaintiff?

Mr. Sweeney: Yes.

The Court: The plans were prepared in the first instance at the suggestion of the defendant?

Mr. Sweeney: Yes.

The Court: And they were modified from time to time at the suggestion of the defendant?

Mr. Sweeney: Yes.

The Court: And certain features of the building were eliminated, so as to bring the cost within the means of the defendant?

Mr. Sweeney: Yes; but the first set of plans were a fifty thousand dollars, the second thirty-five thousand dollars, and the third was, I think, the nineteen thousand dollars, which set did not cover the entire lot, and the fourth set was the twenty-five thousand five hundred dollars, which is the set of plans which the defendant should be mulcted for and the only set.

The Court: That, of course, is only upon the theory that the court did not in all respects believe the testimony of the plaintiff, because the testimony of the plaintiff as we read it is to the effect that in the preparation of all of these plans he was acting under the direction of the defendant, and that he was changing his plans from time to time to meet the latter's views.

Mr. Sweeney: If the court gets that idea out of the case, well and good.

The Court: We are satisfied from the facts of the case and the statement of the facts appearing upon this discussion, and for the reasons stated therein, that the judgment and order appealed from should be affirmed, and that will be the order.

[Crim. No. 616. First Appellate District.—January 21, 1916.]

THE PEOPLE, Respondent, v. MERTON COX, Appellant.

CRIMINAL LAW—GRAND LARCENY—THEFT OF HORSE—SUFFICIENCY OF EVIDENCE.—Upon a prosecution for grand larceny in stealing a horse in one county and driving it through other counties into the county where it was found in the defendant's possession, proof that the defendant assumed a false name when traveling with the horse, and at the time of its sale by him and when he was arrested, taken in connection with proof of such possession, and the inability to find the person from whom he claimed to have purchased the animal, is sufficient to support a verdict of conviction.

ID.—EVIDENCE—FALSEHOOD OF DEFENDANT—CONSCIOUSNESS OF GUILT.—When a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and

concealment, tends to show a consciousness of guilt, and thereby strengthens any inference of guilt arising from other established facts.

ID.—ARGUMENT OF DISTRICT ATTORNEY—COMMENT UPON INABILITY TO FIND ALLEGED SELLER OF HORSE—ABSENCE OF MISCONDUCT.—In such a prosecution it is not misconduct for the district attorney to comment upon the fact that the return upon one of the foreign subpoenas showed that the person from whom defendant claimed to have purchased the horse could not be found, and in stating that that was some evidence of the fact that such person was a mythical person, where such subpoenas and the returns thereon were offered and received in evidence without limitation upon their purpose.

ID.—COMMENT UPON DEFAUDING OF PURCHASER—ADMONITION TO DISREGARD—LACK OF PREJUDICE.—In such a prosecution it is misconduct to urge upon the jury a consideration of the fact that the defendant had defrauded the purchaser of the horse, but such misconduct is not prejudicial where it is checked almost at its inception by the intervention of the trial court, coupled with an admonition to the jury to disregard the statement.

APPEAL from a judgment of the Superior Court of Santa Cruz County, and from an order denying a new trial. Benjamin K. Knight, Judge.

The facts are stated in the opinion of the court.

Lucas F. Smith, and Lucas F. Smith, Jr., for Appellant.

U. S. Webb, Attorney-General, Frank L. Guereña, and George W. Smith, for Respondent.

THE COURT.—As we understand this case, from an inspection of the record and the briefs, the facts are substantially these: The defendant was charged with the crime of grand larceny. The alleged subject matter of the larceny was a horse, charged in the information to have been stolen in the city and county of San Francisco, and driven through San Mateo and other counties into the county of Santa Cruz. The defendant was found in the latter county in the possession of the horse. He there sold the horse under the name of J. Geary; he requested that the check for the payment of the horse be made out in that name, gave a receipt in that name, and when he cashed the check he indorsed the name of J. Geary thereon. When arrested he was asked by the party making the arrest if his name was J. Geary, and he said it

was. It is an admitted fact in the case that the true name of the defendant is Merton Cox. There is some evidence in the record as to his conduct and his statements on the night that he arrived in San Jose, and on another night when he arrived at Rockaway Beach in San Mateo County, and that when asked whence he had come and where he was going he said he had been traveling over the greater part of the state for the greater part of six months; that he had had the horse shod in Oakland, that he had come down by the coast route in a certain number of hours. When he was in jail the party to whom he had sold the horse visited him, and asked him to return the one hundred dollars which he paid defendant for the horse, and the defendant then said, "Well, you are entitled to the money, but I won't give you a written order for the money." The defendant claimed that he bought the horse from a man by the name of John O'Brien, in San Francisco; that he had known O'Brien since 1902; that O'Brien had worked for him at odd times since 1902, but that he did not know where he lived in San Francisco. Foreign subpoenas were issued in the case at the request of the defendant for O'Brien and several other witnesses. The return upon the foreign subpoenas showed that none of the witnesses, and particularly John O'Brien, the person from whom the defendant claimed to have bought the horse, could be found, and during the course of the trial, counsel for the defendant offered these subpoenas and the return thereof in evidence. Counsel for the defendant claims that there is no evidence showing that he committed the larceny or participated therein save and except the recent possession of the stolen property.

Mr. Lucas F. Smith (Counsel for Defendant): That is exactly it.

The Court: You don't make the point that the evidence is insufficient to show that the horse was in fact stolen by somebody?

Mr. Smith: We concede it is sufficient in that particular.

The Court: It is claimed—in addition to the point of the insufficiency of the evidence connecting the defendant with the commission of the crime—that the district attorney was guilty of misconduct in commenting upon the fact that the return upon one of the foreign subpoenas showed that O'Brien could not be found, and in stating that that was some evidence of the fact that John O'Brien was a mythical person.

The district attorney is also charged with misconduct in commenting upon the refusal of the defendant to return the money which he received from the sale of the horse, and in attempting to argue that the defendant had defrauded the purchaser.

Other points are that the court erred in modifying certain requested instructions, and erred in the charge given of its own motion.

Have we stated in substance all the facts in the case, and are those all the points made in support of the appeal?

Mr. Smith: Yes, your Honor.

By the Court (after argument): The court is of the opinion that there is no merit in the appeal. The jury were not compelled to accept the defendant's explanation of why he assumed a false name when traveling with the horse and at the time of the sale and when he was arrested. They were justified in finding from all of the evidence adduced in the case that, as the verdict implies, his assumption of a false name was for the purpose of concealing his identity and thereby warding off suspicion; and when a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and concealment, tends to show a consciousness of guilt, and thereby strengthen any inference of guilt arising from other established facts. (*People v. Cole*, 141 Cal. 88, [74 Pac. 547].)

The defendant's story concerning the circumstances under which he claimed to have purchased the horse was far from being satisfactory; and it is of peculiar significance that although he claimed to have been intimately acquainted with the Mr. O'Brien from whom he said he purchased the horse since the year 1902, and had employed O'Brien on and off from that time until the year 1915, yet he did not know where O'Brien resided. We are satisfied that the circumstances above narrated relative to the defendant's sale of the horse, the manner of his possession, and his conduct when arrested, considered in conjunction with the defendant's recent possession of the stolen property, are sufficient to warrant and support the verdict. (*People v. Vidal*, 121 Cal. 221, [53 Pac. 558].)

The foreign subpoenas and the returns thereon having been offered and received in evidence without limitation upon their purpose, the district attorney was well within his rights in

arguing to the jury the fact that the return showed that John O'Brien could not be found should be considered in connection with other evidence in determining whether or not O'Brien was a person in being, or merely a creature of the defendant's imagination. Inasmuch as counsel for the defendant developed in evidence the fact that the defendant had refused to return the money which he had received upon the sale of the horse, the district attorney was justified in assuming that he was privileged, in his argument to the jury, to comment upon that phase of the case. He did, however, overstep the bounds of legitimate argument when he attempted to urge upon the jury a consideration of the fact that the defendant had defrauded the purchaser of the horse. But this misconduct was checked almost at its inception by the intervention of the trial court, coupled with an admonition to the jury that such fact must not be considered in determining the guilt or innocence of the defendant of the crime of larceny. This, we think, sufficed in the present case to protect the defendant from any prejudice which otherwise would have resulted.

Our investigation of the record discloses that many of the numerous instructions requested on behalf of the defendant were properly modified and then given to the jury. The trial court was not bound to give any particular instruction in the language requested by the defendant; and if the instruction as modified and then given correctly states the law, the defendant cannot be heard to complain.

Other instructions were properly refused, either because they were covered by the charge of the court, or were uncertain in whole or in part in their statement of the law. We are satisfied that the charge of the court in its entirety clearly and correctly stated the law of the case.

The judgment and order appealed from are affirmed.

[Crim. No. 618. First Appellate District.—January 21, 1916.]

THE PEOPLE, Respondent, v. JOSEPH BERNON,
Appellant.

CRIMINAL LAW—RAPE—FEMALE UNDER AGE OF CONSENT—EVIDENCE—CORROBORATION—ACCOMPLICE.—A female under the age of consent is not an accomplice in the crime of rape committed upon her, nor does the law require that her testimony be supported by corroboration in order to sustain a conviction.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—LACK OF PREJUDICE.—In a prosecution for rape on a girl under the age of consent it is misconduct for the district attorney, on cross-examination of a witness, to ask whether the sister of the prosecutrix told the witness that defendant, her father, did the same things to her that he was charged with doing to the prosecutrix; but where the court sustained the objection of the defense to the question and charged the jury to disregard the statements of counsel and all evidence not presented in a legal way, and the district attorney abandoned the subject, the misconduct was not prejudicial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. William H. Langdon, Judge presiding.

The facts are stated in the opinion of the court.

E. B. Mering, and M. J. Gillespie, for Appellant.

U. S. Webb, Attorney-General, and Frank L. Guereña, for Respondent.

THE COURT.—This is an appeal from a judgment of conviction of the defendant upon a charge of rape alleged to have been committed by the defendant upon his daughter, Leona Bernon, a girl of the age of fourteen years, and from an order denying a new trial.

Mr. Mering (for the Appellant): Your Honors, our contention is that the defendant was convicted on the uncorroborated testimony of an accomplice; the girl herself was an accomplice under *People v. Robbins*, 171 Cal. 466, [154 Pac. 317], which was a case of the unmentionable crime on a boy sixteen years of age, and the supreme court said he was an accomplice. It would be exactly the same as with a boy—

The Court: If this girl was below the age of consent she could not have consented to this crime.

Mr. Mering: But the boy was below the age of consent.

The Court: Our statute does not make the rule of consent applicable to a boy as well as to a girl. The only application of the rule as to the age of consent is as to females. There is no doubt about that.

Mr. Mering: She cannot give consent to the crime. The girl herself testified that she had had intercourse with another young man. This shows the corruption of her mind. There is certainly a distinction between the weight of testimony of a girl who resists and is outraged, and the girl who says, "Yes, it is so; it is all right; I consented to it." Isn't the testimony of a girl that is outraged stronger than that of a girl who is not?

The Court: That may be true, but that is a question for the jury. We know of no law, and are cited to no case which holds, that a female below the age of consent is an accomplice in the crime of rape committed upon her, or that requires that her testimony should be supported by corroboration in order to sustain a conviction.

Nor do we think that the testimony of the prosecuting witness in this case is either so weak because of her intellectual or moral infirmities, or is so inherently improbable, as to be insufficient of itself to support a conviction.

These contentions on the part of the appellant we hold, therefore, to be without merit.

Is that the only point you make in the case?

Mr. Mering: No. We also urge the misconduct of the district attorney.

The Court: We find from the record that the alleged misconduct of the district attorney arose from the following state of facts: While the witness, Leona Bernon, was upon the stand the prosecuting officer asked her the following questions:

"Q. Well, did your sister live home at one time with yourself and your father? A. Yes.

"Q. Where did she sleep when she was at home?"

To this latter question counsel for the defendant objected upon the ground that it was irrelevant, and some cross-fire arose between counsel as to the proper way to conduct the trial, which continued for some moments after the court had

sustained the defendant's objection but during which no assignment of misconduct was made. Later, however, and during the cross-examination of one of the defendant's witnesses, the prosecuting officer asked the following question:

"Q. When you were talking to this girl about the time you said they were telling you different things upon which you were basing your statements about them, did Josephine tell you that her father did the same things to her too?"

To this question the defendant offered the proper objection that it was incompetent, irrelevant, and immaterial, and was misconduct on the part of the district attorney, and proceeded to arraign the latter severely for his improper action. The court promptly sustained the defendant's objection, and at once and of its own motion proceeded to charge the jury that they were to disregard and put out of their minds the statements of counsel and all evidence not presented in a legal way. The matter was immediately dropped, and was not adverted to again during the trial.

While the action of the prosecuting officer in asking this improper question, and in thus referring to a subject hinted at and properly excluded in connection with his former question, is to be reprobated, and the too frequent practice of prosecuting officers to press similar questions and insinuations beyond the point of propriety and fairness is to be rebuked and discouraged, still we think that in the present case the prompt instruction of the court to the jury of its own motion to disregard and put from their minds the offending matter, attended as it was by the district attorney's coincidence in the views of the court evinced by his abandonment of the subject, takes this case outside of the case of *People v. Derwae*, 155 Cal. 592, [102 Pac. 266]; and within the rule laid down in the following cases: *People v. Smith*, 23 Cal. App. 382, [138 Pac. 107]; *People v. Bradbury*, 151 Cal. 675, [91 Pac. 497]; *People v. Salas*, 2 Cal. App. 537, [84 Pac. 295]; *People v. Amer*, 8 Cal. App. 137, [96 Pac. 401]; *People v. Ho Kim You*, 24 Cal. App. 451, [141 Pac. 950]; *People v. Ong Git*, 23 Cal. App. 148, [137 Pac. 283].

No other error appearing in the record of sufficient consequence to merit review, the judgment and order denying a new trial are affirmed.

[Civ. No. 1588. First Appellate District.—January 21, 1916.]

**RICHMOND CONSTRUCTION COMPANY, Respondent,
v. SAM GROWNEY, Appellant.**

STREET LAW—RESOLUTION OF INTENTION—DESCRIPTION OF WORK—REFERENCE TO PLANS AND SPECIFICATIONS.—In the matter of street improvement proceedings the law does not require that the resolution of intention shall in terms describe in detail the work to be done thereunder, but provides that the resolution may give that description by reference to plans and specifications contemporaneously created and adopted.

ID.—FORECLOSURE OF LIEN—CONSTRUCTION OF COMPLAINT—DESCRIPTION OF WORK—RESOLUTION OF INTENTION—REFERENCE TO PLANS AND SPECIFICATIONS.—A complaint in an action for the foreclosure of a lien for grading a street, and for the construction of gutters on either side thereof and bridges at the cross-walks, which alleges the passage of a resolution of intention, wherein it was resolved “that gutters three feet wide, grouted, be constructed on both sides of the roadway . . . and that wooden bridges 4 ft. by 5 ft. be constructed over the gutters at each end of each cross-walk place, . . .” sufficiently describes, in the absence of a special demurrer for uncertainty and ambiguity, the work to be done upon such gutters and bridges, where it is also alleged in a subsequent paragraph of the complaint “that before passing the resolution for the construction of said work or improvement, plans and specifications and careful estimates of the costs and expenses thereof had been required by it to be furnished to said board by the city engineer of said city and special specifications therefor had been furnished by him.”

APPEAL from a judgment of the Superior Court of Contra Costa County. R. H. Latimer, Judge.

The facts are stated in the opinion of the court.

L. G. Harrier, for Appellant.

Johnson & Shaw, for Respondent.

THE COURT.—This is an action to foreclose a street assessment lien, the complaint in the case alleging that the city trustees of the city of Richmond, by a resolution of intention, had determined to do certain street work upon a designated street, consisting of the grading of that street from curb to curb, and the construction of gutters on either side

of the street and bridges at the cross-walks. The defendant Growney demurred to the complaint only upon the ground of the insufficiency of the facts stated to constitute a cause of action. The demurrer was overruled. The defendant, failing to answer, judgment was rendered against him, and the appeal is upon the judgment-roll alone.

The point made in the lower court and made here in support of the demurrer is that the construction of the gutters and of the bridges was a material part of the whole work proposed to be done under the resolution of intention, and that the description therein of the work to be done upon the gutters and upon the bridges was inadequate and insufficient to give notice to the property owners affected by the resolution of intention, or to insure fair competition among bidders for the work. The complaint is assailed upon the ground that it does not allege that the resolution of intention designated the material of which the gutters were to be constructed, nor the kind of wood to be used in the construction of the bridges. In this behalf the complaint alleges the passage of a resolution of intention, wherein it was resolved "that gutters three feet wide, grouted, be constructed on both sides of the roadway . . . and that wooden bridges 4 ft. by 5 ft. be constructed over the gutters at each end of each cross-walk space. . . ." It is insisted on behalf of appellant that the word "grouted" does not convey any idea of the kind of material to be used in the construction of the gutters, and that the kind of wood to be used in the bridges should have been specified, that is to say, whether they were to be constructed of redwood, pine or oak. The resolution of intention to do the proposed work was an essential prerequisite to the jurisdiction of the governing body of the municipality to inaugurate such work, and consequently if it was deficient in its description of a material part of the work to be done thereunder, it would not suffice to support a cause of action for the foreclosure of the assessment lien. The law, however, does not require that the resolution of intention shall in terms describe in detail the work to be done thereunder, but provides that the resolution may give that description by reference to plans and specifications contemporaneously created and adopted. It is the contention of the appellant that the allegation of the complaint purporting to describe the proposed work upon the gutters and bridges is not aided by an allegation that the resolution of intention

referred to plans and specifications, but, to the contrary, it is claimed the complaint shows affirmatively and unequivocally that no plans and specifications of the proposed work, or any part thereof, were adopted until after the passage of the resolution of intention.

Mr. Harrier (Counsel for Appellant) : My understanding of the situation is that if the resolution of intention refers to plans and specifications which are already on file, that, according to very recent cases (*Chase v. Trout*, 146 Cal. 350, 367, [80 Pac. 81]; *McQuiddy v. Worswick etc. Paving Co.*, 160 Cal. 9, 14, [116 Pac. 67]), is sufficient, and would make a perfectly good resolution of intention.

The Court: Well, that being so, it may be conceded that the gutters and bridges constituted a material part of the whole work to be done; and assuming for argument sake that the allegation of the complaint standing alone, which purported to describe the work to be done upon the gutters and bridges, was deficient in the particulars previously stated, still we are of the opinion that in the absence of a special demurrer for uncertainty and ambiguity, the complaint as a whole states a cause of action which will support the judgment. Paragraph 7 of the complaint, as set out on page 5 of the transcript, alleges "that before passing the resolution for the construction of said work or improvement, plans and specifications and careful estimates of the costs and expenses thereof had been required by it to be furnished to said board by the city engineer of said city, and special specifications therefor had been furnished by him." That allegation, we think, must be construed to refer to the resolution of intention referred to in paragraph 4 of the complaint, and if that be true, then it follows that the complaint does allege that the resolution of intention did refer to plans and specifications; and said allegation may be further construed to mean that such plans and specifications were on file at the time of the passage of the resolution of intention.

Mr. Harrier: I do not think that construction possible, because the next paragraph mentions a resolution to do the work which was passed September 16, 1907. My idea is that there is a difference between a resolution of intention and a resolution for the construction of the work. The resolution of intention is not the resolution for the construction of the work. That is a different resolution.

The Court: It is true paragraph 8 of the complaint alleges "that afterward, to wit, on the 16th day of September, 1907, . . . the said Board of Trustees passed a resolution . . . ordering and providing for said street work to be done. . . ." But the resolution referred to in paragraph 7 of the complaint is neither expressly nor by necessary implication related to the resolution referred to in paragraph 8. Moreover, the latter paragraph expressly alleges that the resolution referred to therein was passed after the resolution referred to in paragraph 7. Chronologically considered, the allegations of paragraph 7 must be read as relating solely to the matters alleged in the preceding paragraphs of the complaint, and the complaint not having theretofore referred to any resolution other than the resolution of intention, we are of the opinion that the allegations of paragraph 7 should be construed as having reference to the original resolution of intention.

Mr. Harrier: I see that it is possible for it to be construed that previous to the passage of the resolution of intention these plans and specifications may have been adopted.

The Court: The complaint may be ambiguous and uncertain in the particulars immediately under discussion, but, in the absence of a special demurrer, we feel constrained to construe the complaint as stating a cause of action sufficient to support the judgment.

The judgment appealed from is affirmed.

[Crim. No. 330. Third Appellate District.—January 21, 1916.]

THE PEOPLE, Respondent, v. JOSEPH D. CORNELL,
Appellant.

CRIMINAL LAW—FORGERY—EVIDENCE—EFFECT OF ADMISSIONS.—In a prosecution for forging the names of two persons to the promissory note of the defendant, given to evidence the indebtedness of the defendant to the complaining witness of a certain sum of money which the latter had intrusted to the defendant to be loaned out by him on mortgage securities, and which he had improperly used in furthering a certain resilient tire scheme which he was promoting, it is not error to permit the state to prove the original intrusting of the money to the defendant for loan purposes, nor to prove a conversation had the day before the delivery of the note wherein

the defendant admitted that he had falsely stated to the complaining witness that he had loaned the money upon mortgages, whereas he had in truth used the same for his own private business purposes, notwithstanding the admission by defendant's counsel preceding the opening statement of the district attorney that the sole defense to the charge would be that the defendant had authority to sign the names to the note, and the further admission, when the complaining witness was placed upon the stand, that the note was given as evidence of an antecedent debt.

ID.—MOTIVE—PROOF OF OTHER OFFENSES.—Whenever the question of motive, or purpose, or reason for an act is involved, testimony showing such motive, reason, or purpose is always admissible, even though it may establish the commission of other offenses.

ID.—AUTHORITY TO SIGN NOTE—EVASIVE ANSWER—FURTHER INTERROGATION—RIGHT OF STATE.—Where one of the persons whose name was forged is placed upon the stand by the state and makes evasive answer as to whether he had authorized the defendant to sign his name, it is not prejudicial error to permit the district attorney over objection to further interrogate the witness upon the subject.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—EXAMINATION OF DEFENDANT—MISSPENDING OF OTHER MONEYS—ADMONITION TO DISREGARD.—It is improper to ask the defendant on cross-examination as to whether or not he had not spent a great deal of money that he got from other people in the tire business in which he was engaged, but such misconduct is not prejudicial where the jury was promptly directed to disregard the question and not to draw any inference therefrom.

ID.—INSTRUCTIONS—ACTS OF DEFENDANT—DRAWING OF DIFFERENT CONCLUSIONS—DUTY OF JURY.—It is not error to refuse to instruct the jury to the effect that the law presumes innocence, and where two conclusions may be drawn from the defendant's acts the jury must find him not guilty, where the court gave instructions which covered in substance the only theories involved in the case to which the refused instructions could apply.

ID.—VERDICT—RETURN FOR CORRECTION—WAIVER.—Where at the time a verdict is returned no question is raised as to its form or sufficiency, and the objection is first presented to the trial court upon the defendant's motion for a new trial, the question whether the court should or should not have returned the verdict to the jury and directed reconsideration, as provided by section 1161 of the Penal Code, is not presented for consideration.

ID.—SUFFICIENCY OF VERDICT.—A verdict in such a prosecution in the following form is sufficient, to wit: "We, the jury in the above-entitled cause, find the defendant guilty of the crime of forgery, as charged in the indictment, of the promissory note set forth in the indictment; and we further find that said defendant forged the name of C. O. Cartwright to said promissory note, as charged in

the indictment; and we further find the defendant guilty of uttering and passing the forged promissory note as charged in the indictment."

ID.—LANGUAGE OF VERDICT.—It is not essential that the language of a verdict should follow the strict rules of pleading or be otherwise technical, for whatever conveys the idea to the common understanding will suffice, and all fair intendments will be made to support it.

ID.—FORGERY OF TWO NAMES—EVIDENCE—SUFFICIENCY AS TO ONE NAME—VERDICT.—In such a prosecution the finding of the jury that the defendant was guilty of forging one of the two names to the note in question is sufficient to support the judgment, notwithstanding the evidence is insufficient to support a verdict that he was guilty of forging the other name thereto.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. Malcolm C. Glenn, Judge.

The facts are stated in the opinion of the court.

Theodore A. Bell, A. L. Hart, and R. L. Shinn, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

PLUMMER, J., pro tem.—The defendant was convicted of the crime of forgery; appeals from the judgment of conviction, also from the order denying his motion for new trial, and assigns as reasons therefor the following grounds, to wit: 1st. Errors in the admission of testimony tending to show the commission of a prior offense; 2d. Misdirection of the jury in matters of law, including the refusal to give certain instructions requested by the defendant; and 3d. That the verdict returned by the jury is insufficient, both in form and substance, to sustain the judgment.

It appears from the testimony set forth in the transcript that some time during the year 1910, while the defendant, among other things, was engaged in loaning money for clients, one Maria Jansen called upon the defendant and left with him the sum of seven thousand six hundred dollars to be loaned out upon mortgage securities. Not having received any notes or mortgages from the defendant, Mrs. Jansen, in company with her uncle, Lauridson, called upon the defendant

at his office in Sacramento the sixth day of October, 1913, and asked the defendant for the mortgage, or mortgages, upon the security of which her money had been loaned. The defendant replied that the mortgages were in the recorder's office. Mrs. Jansen and her uncle, Lauridson, repaired to the recorder's office, and, failing to find any such instrument, or instruments, of mortgage, returned to the defendant's office and stated such fact to him. After some conversation then had, the defendant told Mrs. Jansen and her uncle that he had lied about the mortgages, that the money had not been loaned, that he had used it himself in furthering a certain resilient tire scheme which he was promoting, and promised to give Mrs. Jansen a note for the amount of money which he had used, signed by himself, his father, and one Dr. C. O. Cartwright. To this arrangement Mrs. Jansen consented. The defendant further stated that if Mrs. Jansen would return on the following morning he would have the note signed and ready for delivery. Upon the return of Mrs. Jansen on the following morning the defendant delivered to her a note dated October 7, 1913, for the sum of seven thousand six hundred dollars, to which was attached the names of the defendant, James Cornell, and C. O. Cartwright.

The indictment alleges that the names, James Cornell and C. O. Cartwright, were forged, and upon such charge the defendant went to trial and was found guilty.

The opening statement of the district attorney included, in substance, what has heretofore been recited, and was objected to in so far as it referred to the placing of the sum in the hands of the defendant by the witness Jansen, and also as to the conversation or relation of matters which took place between the defendant and the witnesses Jansen and Lauridson on the sixth day of October, 1913, by reason of an admission made by counsel for the defendant preceding such opening statement, and the introduction of any testimony, such statement being as follows:

"Mr. Bell: May it please the court, before any statement is made by the district attorney in this case, and before the testimony or evidence is introduced on behalf of the prosecution, the defendant desires that it be made a matter of record in this court that his sole defense to this charge is that he had authority from James Cornell and C. O. Cartwright to sign their names to the note in question, and the defendant

will rest upon that as his sole defense." And, further, when the witness Jansen was placed upon the witness-stand, the further admission: "Mr. Bell: Now, we can save a good deal of time, I think, and clear up the atmosphere. There will be no dispute that this note was given by the defendant to the witness upon the stand on October 7, 1913, as evidence of an antecedent debt, and I claim that any evidence prior to that time could not be admitted upon any other theory than to show that there was an antecedent debt of seven thousand six hundred dollars, for which the note was made, thereby showing that the note was given for the full consideration."

It is apparent from this statement that the testimony of the witnesses Jansen and Lauridson that seven thousand six hundred dollars was prior to the execution of the note in question placed in the hands of the defendant, in and of itself would be no more than simply a confirmation of the admission by the defendant of the creation, and, therefore, existence, of an antecedent debt in the event that the defendant used such money for his own purposes. The existence of the debt being admitted, it is not very easy to perceive why the circumstances of the creation of that debt could be harmful to the defendant, or upon what theory the prosecution would be excluded from proving the facts just admitted by the defendant, in the event it did not wish to rely entirely upon such admission.

The testimony of the witnesses that the sum of seven thousand six hundred dollars was placed in the hands of the defendant in 1910 for the purpose of being loaned out on mortgage securities did not, of itself, prove any embezzlement; it simply established the naked fact of the money having been placed in the defendant's possession for a particular purpose.

On the sixth day of October, 1913, when the witnesses Jansen and Lauridson called upon the defendant and asked for the mortgages upon which such money was to be loaned, a conversation was had between the defendant and said witnesses, in which all the facts, practically, stated by the district attorney in his opening statement were gone over, and the defendant then and there promised to give, and did thereafter give, the note in question. This conversation did tend to show that the defendant had embezzled the money theretofore left with him by the witness Jansen. Such conversation, and the occurrences then and there had, constituted the reason and

the inducing cause for the execution and delivery of the note which the defendant then and there stated he would have signed and ready for delivery to the witness Jansen on the following morning. It is clear that all that took place between the defendant and the witnesses Jansen and Lauridson on the sixth day of October, which led to the giving of the note and was consummated by the delivery of the note on the following morning, constituted but one transaction, and, irrespective of whether it tended to show the defendant guilty of a prior offense, was a part of the *res gestae*, and admissible in testimony to show the circumstances attending the giving of the note.

The defendant relies strongly upon the decision in the case of *People v. King*, 23 Cal. App. 259, [137 Pac. 1076], wherein the undisputed rule that proof of an offense distinct from and wholly disconnected with the particular crime charged against a defendant is not admissible in evidence, is set forth and applied. In that case the defendant was charged with embezzlement. The defendant admitted the receipt of the money, and set up in defense that he had returned the same. Notwithstanding such defense and admission made by the defendant at the beginning of the trial, the prosecution was allowed to prove other distinct acts of embezzlement. We do not see that there is any necessity for either criticising or approving the decision in the *King* case, as it is readily distinguishable from the one at bar. The circumstances of previous embezzlement by the defendant *King* had nothing to do with the *actual* embezzlement of the moneys for which he was being tried, and which it was claimed by him he had returned to the owner thereof.

In the case at bar, the testimony as to prior offense admitted is the conversation had between the defendant and the witnesses Jansen and Lauridson on the day preceding the giving of the note about the deposit or leaving with the defendant of certain moneys to be loaned on mortgages, inquiry for said mortgages, admission by the defendant that no such mortgages were ever taken, after having stated that such mortgages were in the recorder's office, the further admission by the defendant that he had used the money; a statement by one of the witnesses that the defendant might be sent to prison for such offense, and the offer by the defendant to give the note for the forging of which he was tried and convicted.

The King case and others, following the rule therein laid down, wherein testimony as to other offenses is held inadmissible, rests upon an entirely different state of circumstances, such testimony being excluded only when the offenses are disconnected, and, whether the testimony as to the leaving of the seven thousand six hundred dollars with the defendant in 1910, as related by the witnesses, before anything was said of the conversation had between the defendant and the witnesses on October 6th, was or was not admissible, the defendant was not prejudiced thereby, because all the facts showing his prior embezzlement of the moneys are included in the circumstances occurring on the 6th of October, upon which the note involved in this case is based.

Again, whenever the question of motive, or purpose, or reason for an act is involved, testimony showing such motive, reason, or purpose is always admissible, even though it may establish the commission of other offenses. (*People v. Soeder*, 150 Cal. 12, [87 Pac. 1016]; *People v. Argentos*, 156 Cal. 720, [106 Pac. 65]; *People v. Sanders*, 114 Cal. 216, [46 Pac. 153]; *People v. Cook*, 148 Cal. 340, [83 Pac. 43]; *People v. Hatch*, 163 Cal. 368, 378, [125 Pac. 907]; *People v. McPherson*, 6 Cal. App. 266, [91 Pac. 1098]; *People v. Courtright*, 10 Cal. App. 522, [102 Pac. 542]; *People v. Mack*, 14 Cal. App. 12, [110 Pac. 967].)

A large number of other cases might be cited, but these will suffice to illustrate the point in controversy, and, in our opinion, clearly establish the admissibility of the testimony referred to.

During the course of the trial the defendant's father, James Cornell, was placed upon the witness-stand by the prosecution and asked as to whether he had or had not authorized the defendant to sign his name to promissory notes. The witness not answering the question directly, or rather having answered in a more or less evasive manner, the district attorney proceeded to interrogate the witness further, over the objection of the defendant that the prosecution was cross-examining its own witness, and that the cross-examination was for the purpose of discrediting the testimony of the witness and inducing the jury to disbelieve his statements. While the ruling of the court in this particular may have been technical error, a reading of the testimony of the witness James Cornell does not disclose anything really prejudicial, and, in view of the



decision in the case of *People v. Leyshon*, 108 Cal. 440-446, [41 Pac. 480], which will be further discussed herein, it is clear that the defendant suffered no injury from the course of the district attorney in this particular, or of the ruling of the court in relation to such testimony.

Misconduct on the part of the district attorney is assigned as having occurred in the course of his cross-examination of the defendant. The transcript shows the following: "Mr. Jones: Question. How long have you been engaged in this business—this tire business? Answer: Well, it has been several years. It was early in 1910. It might have been in 1909—the latter part of 1909—when that proposition was first presented to me. Question: You have spent a great deal of money in it? Answer: Yes. Question: Spent a great deal of money that you have got from other people in it?" The asking of this question was assigned as error, and in the course of the colloquy that ensued, the court stated the matter as follows: "He [referring to the defendant] stated that so far as one of the persons is concerned—that is, Mrs. Jansen—he spent her money. As to any other person, Mr. Jones, your question is improper," and, after an apology by the district attorney, instructed the jurors to pay no attention to the question. The question, in and of itself, does not directly assume that the defendant had improperly spent any money belonging to others, and the jury having been promptly directed by the court not to pay any attention to the question or to any inference that might be drawn therefrom as to any other moneys, we do not think that the defendant was materially prejudiced. That the act of the district attorney was not sufficient to warrant reversal, we refer to *People v. Glaze*, 139 Cal. 159, [72 Pac. 965]; *People v. Lawrence*, 143 Cal. 148, 156, [68 L. R. A. 193, 76 Pac. 893]. The question by the district attorney of the defendant, as to whether he had not spent considerable money in riotous living, was not objected to, and, therefore, need not be considered. Other objections were also urged against the admission of certain testimony, but they do not seem to be of sufficient importance to require any statement herein.

In behalf of the defendant's second assignment of reasons for reversal it is argued with considerable insistence that the court erred in instructing the jury, and especially in the refusal to give defendant's proposed instructions numbered

7 and 8. Defendant's proposed instruction No. 7 is as follows: "You are instructed that if the testimony in this case in its weight and effect be such that two conclusions *cannot* be reasonably drawn from it, the one favoring defendant's innocence and the other tending to establish his guilt, the law demands that the jury shall adopt the former and find the defendant not guilty." (Assuming that the word "cannot" was a clerical error and should have been corrected by the court to read "can," we will consider the instruction in its corrected form.)

Defendant's proposed instruction No. 8 reads: "You are instructed that when, from the evidence, a man's conduct may be as consistently and reasonably referred to, two motives, one criminal, the other not criminal, the law will ascribe it to that which is innocent, and it is your duty to so find."

These two instructions, while different in form and language, convey practically the same idea, to wit, that the law presumes innocence, and where two conclusions may be drawn from a defendant's acts, the jury must find him not guilty.

Was it error on the part of the court to refuse said proposed instructions?

Instruction No. 41 proposed by the defendant and given by the court reads as follows: "In this case, C. O. Cartwright has testified that the defendant had no authority to sign his name to said promissory note. I instruct you that you are sole judges of the fact as to whether the defendant had authority so to do, or believed that he had such authority, and unless you feel an abiding conviction to a moral certainty that the defendant did not have such authority and did not believe that he had such authority, then you must find the defendant not guilty."

Further, defendant's proposed instruction No. 37, given to the jury by the court, reads: "I charge you that if after an entire comparison and consideration of the evidence in this case you entertain a reasonable doubt as to whether the defendant and C. O. Cartwright became partners, and that defendant signed the name of C. O. Cartwright to said promissory note, believing that he had the right to sign the name of C. O. Cartwright as his business associate or partner, then you must find the defendant not guilty."

Defendant's proposed instruction 38 on the same point, and given by the court, is as follows: "If the defendant be-

lieved that he had the right to sign C. O. Cartwright's name to said promissory note by reason of the claim made by the defendant that he and said Cartwright were associated together in business, then I charge you that such belief destroys all criminal intent, and you must find the defendant not guilty."

Further instructions given by the court were to the same tenor and import as these just recited. The two theories upon which the case was tried, by the admission of the defendant through his counsel at the beginning thereof, were, on behalf of the prosecution, that the defendant had no authority to sign the names as signed in the note, and, on the part of the defense, that he was so authorized, and it was these matters which the instructions just recited directly and forcibly instructed the jury that they must ascertain and find from the evidence against the defendant beyond a reasonable doubt before a verdict of guilty would be justified. There were no other theories involved in the case to which the refused instructions 7 and 8 could possibly apply, and, being covered, in substance, by the instructions given, no prejudice was occasioned by their refusal.

The jury was further instructed: "That every material allegation in the indictment must be established to the satisfaction of the jury beyond all reasonable doubt; that the jury should take into consideration only the evidence, and should disregard and discard from their minds every impression or idea suggested by questions asked by counsel which were not allowed to be answered, and, further, that the presumption of innocence continued through the trial and until the jurors were convinced to a moral certainty and beyond all reasonable doubt of the guilt of the defendant."

Upon the question as to whether a partnership existed between the defendant and C. O. Cartwright, and whether the defendant did or did not have a right to sign the name of the said C. O. Cartwright to the note in question, as such partner, the jury was fully instructed. Also the jury was clearly and pointedly instructed that the defendant could not be found guilty of the offense charged because he might have been guilty of misappropriating the moneys belonging to the witness Jansen.

It may be here proper to remark that the trial court, after once instructing the jury clearly upon the points involved in

the case, was not required to repeat the instructions with all the variableness and shadows of turning possible to skillful and learned attorneys.

Forty-four distinct and separate instructions were asked for by the defendant in this case, which necessarily devolved upon the trial court the duty of sifting out and excluding a large number of them, even though they might be correct statements of the law, as most of them constituted only repetition of what had already been given, with variations in language.

The third reason assigned as grounds for reversal is as to the sufficiency in form and substance of the verdict. It is as follows:

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Joseph D. Cornell.

"We, the jury in the above-entitled cause, find the defendant guilty of the crime of forgery, as charged in the indictment, of the promissory note set forth in the indictment; and we further find that said defendant forged the name of C. O. Cartwright to said promissory note, as charged in the indictment; and we further find the defendant guilty of uttering and passing the forged promissory note as charged in the indictment.

"ROBERT E. CLARK, Foreman."

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[No question was raised at the time of the return of the verdict as to its form or sufficiency, and it was first presented to the trial court upon the defendant's motion for new trial; hence, whether the court should or should not have returned the verdict to the jury and directed the jury to reconsider the same, as provided by section 1161 of the Penal Code, is not presented for consideration.) Section 1150 of the Penal Code provides that "the jury may render a general verdict, or, when they are in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict." Section 1152 of the same code defines a special verdict as one "by which the jury find the facts only, leaving the judgment to the court."

The appellant insists that the court erred in submitting a special form of verdict to the jury. An examination of the sections above referred to shows that there is nothing in this

claim. There is nothing in the verdict, which is special in its nature, as defined by section 1152 of the Penal Code. There is a clause in the verdict which is particular, as language is ordinarily understood, in its reference to the defendant having forged the name of C. O. Cartwright. A special verdict is one which simply finds the facts. To have made this verdict special, under the definition contained in the code, it must have set forth the facts of the defendant signing the name of Cartwright without authority, etc., but, instead of so doing, the jury finds the general fact of forgery, in that the defendant forged a particular name. Is the verdict sufficient to support the judgment?

Looking at the verdict and reading it as a whole, it is clear that the jury intended to find the defendant guilty of forgery, as charged in the indictment, in this, to wit: That he forged the name of C. O. Cartwright to the instrument set forth in the indictment, and thereafter uttered and passed the same as charged.

Bishop, in his *Criminal Procedure*, second edition, section 1005a, speaking of verdicts, says: "The language of the verdict, being that of lay people, need not follow the strict rules of pleading or be otherwise technical. Whatever conveys the idea to the common understanding will suffice, and all fair intendments will be made to support it. As in an indictment or a pleading bad grammar or spelling does not vitiate, so, *a fortiori*, it does not in the verdict unless the meaning becomes inadequate. Surplusage is harmless. The finding must be construed as a whole, not in its separate parts."

In *People v. Brady*, 6 Cal. Unrep. 719, [65 Pac. 824], the court says: "Where the intention of the jury is unmistakable, mere clerical error should be disregarded." In *People v. Jochinsky*, 106 Cal. 640, [39 Pac. 1077], the verdict was as follows: "We, the jury, find the defendant guilty of burglary in the first degree; we find that the goods taken from Prince's store on the night of the 13th and 14th of April, 1893, were brought from Sonoma county into the City and County of San Francisco, State of California, by the defendant." The objection there was that the verdict was both general and special, and that it was faulty because it did not specify where the burglary was committed. The objection was held invalid. In *State v. Bowen*, 16 Kan. 476, the verdict returned by the jury read: "We, the jury, find the defendant

not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree." Upon this the defendant moved to be discharged on the ground that murder includes all the degrees of manslaughter, and the first part of the verdict finding him not guilty in manner and form as charged was responsive to all the charges, and acquitted him of guilt not only of murder but as to all the degrees of manslaughter, and therefore the latter part of the verdict should be disregarded as surplusage. The court held the point not well taken, and that the verdict must be taken as a whole, and its meaning determined from a consideration of every part, and, when so taken, there was no chance for misconception as to the meaning of the jury, and that it found him guilty of the crime of manslaughter.

In *Kimball v. Territory*, 13 Ariz. 310, [115 Pac. 70], the court says: "Where the intention to convict of crime is unmistakably expressed in the verdict, any mere irregularity or surplusage contained therein is immaterial." In that case, however, the verdict simply found the defendant guilty of obtaining property by false representations, without finding him guilty of any intent to defraud, which constituted a necessary part of the crime.

In *People v. Gilbert*, 57 Cal. 96, the verdict was: "We, the jury, find the defendant guilty as indicted to the sum of \$90." The defendant was charged with the crime of embezzlement. The reference in the verdict was held to make it explicitly appear that the jury found him guilty of embezzlement, and that they further found that the sum embezzled was \$90, and the verdict held legally sufficient.

In *State v. Arbruzino*, 67 W. Va. 534, [68 S. E. 269], a verdict was returned in the following form: "We, the jury, find the defendant, Tonio R. Arbruzino, not guilty of the felonious and malicious assault charged in the within indictment with the intent therein charged, but we do find him guilty of the unlawful assault charged with the intent therein also charged." The court held that what the jury meant was to be ascertained by reference to the indictment, and that the verdict should always be read in connection therewith, and if it be certain, upon reading them together, what the meaning of the verdict may be, it is sufficient. (Citing a number of authorities.)

In the same volume, 68 S. E., on page 458, *Barbour v. State*, 8 Ga. App. 27, the sufficiency of a verdict was passed upon, and it was there said: "A verdict is to be given a reasonable intendment, and, when ambiguous, may be construed in the light of the issues actually submitted to the jury under the charge of the court, and, when so construed, it expresses with reasonable certainty a finding supported by the evidence, it is to be upheld as legal."

In *Willingham v. State*, 62 Tex. Cr. 55, [136 S. W. 470], the jury returned a verdict in these words: "We, the jury, find the defendant guilty, and ses his pently at sixty days in jail & \$25 fine." The court, in upholding this verdict, said: "It is well settled, where the sense is clear, that neither incorrect orthography nor ungrammatical language will render a verdict illegal or void, and that it is to be reasonably construed and in such manner as to give it the meaning intended to be conveyed by the jury." (Citing a number of authorities.)

In *State v. Schweitzer*, 18 Idaho, 609, [111 Pac. 130], the verdict read: "We, the jury in the above-entitled case, find the defendant, George Schweitzer, guilty of selling by short weights, as charged in the complaint." This was held sufficient, as the intent of the jury was clear in that it found the defendant guilty. The words, "selling by short weights," might be treated as surplusage, and still the verdict held good, for then it found the defendant guilty as charged in the complaint. This case distinguishes the general current of authority from the case of *People v. Tilley*, 135 Cal. 61, [67 Pac. 42], where it was held that a verdict in these words, "We, the jury in the above-entitled cause, find the defendant, Charles M. Tilley, guilty of receiving stolen property," was insufficient, as it must, in order to constitute a crime, include the knowledge that the property was stolen, and also the intent to deprive the owner of the same. It may be stated, also, that the verdict in the Tilley case did not refer to the indictment or information, which also distinguishes that case from the one at bar, where the indictment is clearly and distinctly referred to.

In *People v. McCarty*, 48 Cal. 557, the verdict returned was: "We, the undersigned jurors, find a verdict of murder in the second degree. A. J. Chase, Foreman." This verdict, being recorded, was read to the jury, and each of the

jurors answered that it was his verdict. It was there stated, in upholding this verdict, that, "while the Penal Code sets forth a form of verdict, it does not bind the jury, and that a mere departure from such form does not of itself vitiate the verdict, if it can be clearly understood as being a general verdict of guilty or not guilty, and that there was no difficulty in understanding the verdict there rendered as being one finding the defendant guilty of murder in the second degree as charged in the indictment.

In *People v. Perdue*, 49 Cal. 427, the verdict returned was: "We, the jury in the case of The People of the State of California vs. Charles Perdue, do find a verdict of manslaughter. By the Foreman, Wm. A. Creps." This verdict was held sufficient.

In the case of *People v. Holmes*, 118 Cal. 444, [50 Pac. 675], the portion of the verdict pertinent here was: "We find a verdict of guilty against all the others named in the indictment, to wit: [setting forth the names] and find a verdict of involuntary manslaughter, not a felony, as charged and laid down by the Court under the head of 'Involuntary Manslaughter,' and pray the mercy of the Court in its sentence and punishment, and so say we all." The court said: "The verdict clearly shows an intention to convict, and the grade of the offense is fixed by declaring it to be involuntary manslaughter. . . . But, whatever may have been the intention of the jury, by no possible construction could we reach the conclusion that the jury meant to acquit the defendants, for they not only found them guilty in terms, but recommended them to the extreme mercy of the court in its sentence and punishment. Whether the crime of which the defendants were found guilty was or was not a felony, did not lie with the jury to declare—the statute does this. There is no good reason why the verdict of a jury should not have a reasonable construction, and be given effect according to its manifest intention. The words 'not a felony' should be rejected as surplusage, and the general verdict of 'guilty of involuntary manslaughter' should stand as the verdict."

Appellant further urges that, admitting the verdict finds the defendant guilty of forging the name of C. O. Cartwright, it is yet silent as to the forging of the name of James Cornell, unless the first clause in the verdict finds the defendant guilty of forging both of the names as charged in the indict-

ment, and that, in such case, as the testimony is insufficient to support a verdict finding the defendant guilty as to James Cornell, a new trial should be granted. This contention is answered in the negative in the case of *People v. Leyshon*, 108 Cal. 440, 445, 446, [41 Pac. 480]. There, the defendant was tried on an information charging forgery to a note of the names of Mrs. Maggie Henry and Eliza J. Clark. The defense interposed was that the business relations between the defendant and the two women whose names appeared upon the note were such that defendant either had authority, or supposed he had authority, to sign their names thereto. As to Mrs. Maggie Henry, there was evidence tending to show some foundation for the position assumed by the defendant; but there was a conflict in the evidence on this point, and upon well-recognized principles the verdict cannot, under such circumstances, be set aside for such cause. As to the name of Eliza J. Clark, signed by defendant, we find in the record not one iota of evidence tending to show in the defendant any authority, or ground upon which to found a belief of authority, to use her name upon the promissory note. As to her, the case presented a bald case of forgery, not relieved by any pretext worthy of consideration. The proof that defendant forged the name of Eliza J. Clark to the promissory note described in the information is sufficient alone to uphold the verdict, and for that reason the several rulings of the court upon the admission and rejection of testimony touching the business relations between defendant and Mrs. Maggie Henry need not be considered, for, if erroneous, such rulings do not, under the circumstances, call for a reversal."

In this case, as heretofore stated, the defendant sets up a like defense. The testimony as to whether the defendant did or did not have authority to sign the name of James Cornell is of such a character that the court would not be warranted in holding it sufficient to support the verdict. But the testimony as to the authority of the defendant to sign the name of C. O. Cartwright, is of such a nature and character as to abundantly warrant the jury in finding the verdict which it returned. A careful reading of the testimony shows that the defendant's claim of authority to sign the name of C. O. Cartwright by reason of their alleged relations is little more than what was called in the *Leyshon* case "a mere pretext." The whole basis of the claim of the defendant as to his author-

ity to sign the name of Cartwright rested upon the fact that some years previously the defendant had assigned to Cartwright a one-third interest of his one-third interest in certain pending applications for patents in the Crosby tire, which the defendant was exploiting; that C. O. Cartwright had on a previous occasion at a bank in Sacramento signed a note with the defendant. But the testimony shows that the defendant at no other instance ever affixed the name of Cartwright to any paper; that there were no business relations between the defendant and Cartwright as to the patents involved, that Cartwright never participated in any way in the management thereof, or agreed to become a partner or in any way associated with the defendant in his business enterprises, or did anything that a partner would ordinarily be expected to do, and the fact of the defendant's having signed the name of James Cornell and C. O. Cartwright to the note in question was never disclosed by the defendant to either of the persons whose names he had signed, and was only discovered by them a long time afterward when Mrs. Jansen was seeking payment on the note.

The holding in the Leyshon case disposes of the objection urged by appellant that the testimony being sufficient to establish forgery only of one name to the note, the admission of the note in evidence was error. The crime of forgery being established by proof of the forgery of one name, the testimony need go no further, and the note was clearly admissible in evidence.

Finding no substantial reason for reversal herein, the judgment and order of the trial court will be, and the same are hereby, affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 19, 1916, and the following opinion then rendered thereon:

PLUMMER, J., *pro tem.*—A re-examination of the record in this cause discloses the fact that counsel for the defendant did enter an exception to the form of the verdict at the time of its return by the jury. This exception does not appear to have been set out in the reporter's notes, and was inserted

in close, typewritten form in the minutes of the clerk, where it was not readily discernible and therefore was not seen. The exception simply went to the form and not to the sufficiency of the verdict, and it nowhere appears that the court was requested to return the verdict to the jury and instruct the jury to further consider the same, as provided by section 1161 of the Penal Code. But, as appears from the opinion of the court hereinbefore rendered, the form and the sufficiency of the verdict returned by the jury in this case have been carefully and fully considered, as having been properly presented for consideration upon motion for new trial in the court below, and as presented to this court on appeal, no injury has resulted to the defendant. However, that no further misapprehension may arise, and in the furtherance of accuracy, the following words, "No question was raised at the time of the return of the verdict as to its form or sufficiency, and it was first presented to the trial court upon the motion for new trial, hence whether the court should or should not have returned the verdict to the jury and directed the jury to reconsider the same as provided in section 1161 of the Penal Code, is not presented for consideration," will be, and the same are hereby, stricken from the opinion heretofore rendered. Every question concerning said verdict which could have been considered if the court had been requested to return the verdict to the jury under said section, having been fully set forth by this court in its consideration of the form and sufficiency of the verdict in its opinion, no reason is presented why a rehearing should be granted to consider the provisions of said section.

The appellant also urgently insists that a rehearing should be granted in order that further consideration may be had of certain instructions not specifically set forth in the court's opinion, and also for the reason that his cause has been prejudiced by the language of the court in reference to his alleged partnership with Dr. C. O. Cartwright.

The defendant was not on trial for embezzlement, and hence instructions 42, 43, and 44, not specifically mentioned in the opinion heretofore rendered, requested by the defendant and refused by the trial court, were properly refused, though correct statements of the law.

Instruction 44, in so far as it had any bearing upon this case, was included in instruction number 45, given at the

request of the defendant, wherein the jury was instructed that evidence of an offense different from that alleged in the indictment could not be considered by them as rendering it more probable or likely that the defendant committed the offense charged, etc. Nor does it appear that the modification of instruction number 23 by the trial court was such as to cause any miscarriage of justice. The jury was instructed that "a general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartner by an instrument in writing." This would necessarily include promissory notes as an instrument in writing. This instruction is followed by one stating that authority to sign one's name to a promissory note might be given by mere word of mouth.

Defendant's instructions 24, 25, 26, and 27 were covered by instructions given by the court.

Instruction 20 was properly refused, as there was no testimony upon which it could be based.

To show that there has been no miscarriage of justice, as contemplated by section 41½ of article VI of the constitution, by reason of any technical errors of the trial court, and also that the defendant has not been prejudiced by this court in applying a quotation from the opinion of the supreme court in the case of *People v. Leyshon*, 108 Cal. 440, 445, [41 Pac. 480], to the cause at bar, the defendant's own testimony may properly be set forth.

The seven thousand six hundred dollars misappropriated by the defendant was received by him in the year 1910. In reply to the question (Tr., p. 100), "What did you do with the money, or in what manner, if any, did you loan or invest it for her," he testified: "The money was invested by me in the development and operation of a certain patent resilient spring tire. The money was practically loaned to the Crosbie Resilient Tire Company, which was organized for the purpose of exploiting and developing and placing on the market that tire. I do not recall at the moment when the corporation was organized, but I believe in 1910 or early in 1911. I had absolute charge of the business of the corporation."

As to what took place between the defendant and Dr. Cartwright most clearly appears from the testimony of the defendant in reply to questions by the court (Tr., p. 150 et seq.):

"Prior to November 9, 1911, had you had any conversation on that particular subject as to becoming associated with him? Ans. I think not. I think that the conversations that I had with him prior to that time were along general lines as to the development of the tire and its possibilities. Ques. Well, now, what was that conversation, in substance? Ans. We were speaking of the tire, its possibilities, and speaking of the foreign patents, and I told the doctor of the large amount of money that it was taking to exploit and develop this tire, and how much more it was taking than I ever thought it would take in the first place when I went into it; the patents and all the incidental expenses, and I stated to him, however, that I had the utmost confidence in it, and my confidence was growing as I observed the development of the tire. And he also expressed confidence in the tire; in fact, had always had confidence in it. And then I suggested to him that he become associated with me in business—in the foreign business, not the United States patents or the United States business, but the foreign business. Ques. Well, you say, 'I suggested to him that he become associated.' Did you say: 'Doctor, I would like to have you associated with me in this?' Ans. Probably words to that effect. I won't say just exactly what the words were; but I did tell him that I would like to have him become associated with us in it and reap the benefits with us when there were any benefits to be reaped, and assist us in any way possible in the development if it became necessary. Ques. Well, then, what did he say? Ans. Well, he stated that he would be willing to do so; and I told him that I would then give him an assignment; that I could not give him stock in the foreign patents because there was no foreign corporation covering the foreign patents, but that I would give him an assignment covering my interest in the foreign patents, and that thereafter when the tire had developed sufficiently so that we could commence to market foreign patents or do something with them, and a corporation would be then formed for that purpose; then stock would be issued to him proportionately to the value of the assignments, whatever it might be. Ques. Well, was there another conversation in reference to the subject matter? I am not speaking now in reference to the tire generally, but I mean in reference to his association with you. Ans. Yes; there was some; undoubtedly we held a conversation when I delivered the assignments to

him, but all the conversations were practically along the same lines. If you got one, you practically got them all."

After testifying that the words "association and partnership" were not used in any conversation, that no books were ever opened, that no accounting was ever had, the following testimony appears: (Question by the court.) "I am speaking now as to whether or not there was a partnership. I am trying to get at any conversation that may have been had touching any partnership which was actually formed, or which you thought was formed. As I understand, the result of your testimony was that it was only that one time that you remember specifically that you spoke about him being associated with you? Ans. Well, I cannot recall the definite conversations; but I know that many times he did speak about—when it comes to specifying the time of the conversations, I cannot do it, I cannot recall it; I don't remember it, just when they were. Ques. That is the only time that you can recollect, is the one time when the conversation occurred as you say? Ans. Yes; the specific time that I recollect. Ques. And you said something about becoming associated, and he said 'All right?' Ans. Yes. Ques. And he said in effect, 'All right?' Ans. Yes. Ques. And you do not recall any subsequent conversation, or the details of it, in reference to that particular subject matter. I mean about the association part, other than you said a moment ago? Ans. Only specifically in regard to the conversation which followed about the subsequent formation of an actual partnership. Ques. Yes, but that was never consummated? Ans. No, that has not yet been consummated."

At about the time to which this conversation relates, the defendant delivered to Cartwright an instrument transferring to him for life a one-third interest in the defendant's one-third interest in and to all patents pending and applied for in foreign countries in reference to said tire. The trial was had in September, 1915, and by the defendant's own testimony it appears that the alleged partnership with Dr. Cartwright had not even then been consummated.

The chronological order is as follows: The money was left with the defendant in 1910, to be loaned upon real estate mortgages. The defendant applied it to the uses and purposes of the Crosbie Tire Company, a corporation, of which he was sole manager. In November, 1911, he had a conversation

with Dr. Cartwright about becoming associated with him in foreign patents concerning said tire, which were not being handled by the company. In October, 1913, the note for the forgery of which the defendant was tried and convicted was given to cover the money that had been used by the defendant in the corporation in which he does not testify that Dr. Cartwright had any interest whatsoever. The trial was had September, 1915, at which time, as above stated, partnership relations had not been established.

The testimony of the defendant is quite voluminous, but, as he said to the court, "When you get one conversation, you get it all."

The foregoing, in connection with the opinion heretofore rendered, we think sufficient to show that the defendant's petition for a rehearing herein should be denied, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 21, 1916.

[Civ. No. 1446. Third Appellate District.—January 22, 1916.]

**E. E. HENDERSON et al., Respondents, v. PALMER
UNION OIL COMPANY et al., Appellants.**

RECEIVER—DISSOLUTION OF CORPORATION—EXPIRATION OF CHARTER—JURISDICTION OF SUPERIOR COURT.—Upon the dissolution of a corporation by expiration of its charter, the jurisdiction of the superior court to appoint a receiver is limited by the provisions of section 565 of the Code of Civil Procedure, as in all other classes of dissolution, to the particular superior court of the county where the corporation carries on its business, or has its principal place of business.

ID.—CONSTRUCTION OF CODE PROVISIONS.—The provisions of section 400 of the Civil Code and section 565 of the Code of Civil Procedure were not intended to apply in case of dissolution of a corporation by and according to any particular method.

ID.—TIME OF DISSOLUTION—EFFECT OF.—The provisions of section 565 of the Code of Civil Procedure are not rendered inapplicable to a

case where the corporation has been dissolved for a considerable time, because of the use of the words therein "upon the dissolution," as such phrase means "after dissolution," and is not limited to any particular lapse of time.

APPEAL from an order of the Superior Court of Alameda County appointing a receiver. William S. Wells, Judge.

The facts are stated in the opinion of the court.

Gavin McNab, R. P. Henshall, A. H. Jarman, Nat Schmulowitz, and B. M. Aikins, for Appellants.

Peck, Bunker & Cole, John W. Griggs, Henry G. Tardy, and Henry C. McPike, for Respondents.

BURNETT, J.—On the application of the plaintiffs made *ex parte*, based on a verified complaint and the execution of an undertaking in an amount fixed by the court and approved by it, the superior court of Alameda County made an order appointing one Samuel J. Taylor, a resident of said county, receiver of the court to take charge of the estate and effects of the Palmer Oil Company.

The complaint in the case is quite voluminous, and it seems unnecessary to set it out in detail. Respondents claim that the conditions for the appointment, stated in the complaint, sufficient to warrant said appointment are as follows: "(a) The charter of the Palmer Oil Company expired on the twenty-eighth day of March, 1913. (b) On that day, the defendants, Brown, Van Ee, Hilborn, Stratton, and Ladd, were all of its directors. (c) The plaintiffs, before the expiration of the charter, were and thence to the filing of the complaint continued to be stockholders. (d) Palmer Oil Company was a California corporation. (e) At the time of the expiration of its charter, Palmer Oil Company had estate and effects, debts and property due and belonging to it to be divided among its stockholders. (f) Frauds and improper conduct of directors warranting the action of the court on *ex parte* application."

As to this last specification it may be said that the acts of said directors are set out at great length, and there can be no doubt that the grossest fraud is thereby exhibited, and the utter unworthiness of said directors to occupy a position of trust and responsibility is disclosed.

The provisions of law on which reliance is had for said appointment are the following: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof. . . . 5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." (Code Civ. Proc., sec. 564.) "Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members." (Code Civ. Proc., sec. 565.)

The questions concerning the appointment of receivers have been thoroughly considered by the supreme court in various decisions, and it would be presumptuous to attempt to add to the learning contained therein. For a somewhat general observation we may adopt the quotation made by respondents from the able opinion written by Chief Justice Beatty, in the case of *Havemeyer v. Superior Court*, 84 Cal. 327, [18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121], as follows: "When a corporation ceases to exist, from whatever cause, whether from lapse of time, voluntary dissolution or judgment of forfeiture for neglect or abuse of its powers, it necessarily results that its property is left to be disposed of according to law. . . . Some means must be provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or stockholder, to appoint a receiver to administer the property. But in many of the states, statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same functions, though sometimes called by other names. In all cases, it is made their duty to collect

the assets, pay the debts and distribute the surplus *pro rata* to the stockholders."

Here, as we have seen, the statute expressly provides for the appointment of receivers charged with said duty, and there seems to be no serious controversy as to the authority of the superior court to make the appointment in the cases provided for. There is, however, an earnest contention made by appellants that the jurisdiction to appoint a receiver in case of dissolution of the corporation is limited to the particular superior court where the corporation carries on its business or has its principal place of business. It is said in *State I. & I. Co. v. Superior Court of San Francisco*, 101 Cal. 135, 148, [35 Pac. 554]: "The power of a court to appoint any persons in the place of those who are directors of the corporation at the time of its dissolution is given in section 565 of the Code of Civil Procedure, and the authority given therein is the measure of its power. That section gives to the superior court of the county in which the corporation carries on its business authority to appoint one or more persons to be receivers or trustees of the corporation upon its dissolution, 'on application of any creditor of the corporation, or of any stockholder or member thereof,' and unless such application is made the court has no authority to make the appointment. Its jurisdiction to make such appointment rests upon an application therefor by either a creditor or a stockholder, and can neither be invoked at the instance of a stranger, nor assumed by the court of its own motion." It was further held in that case that "the power of the court recognized in section 400 of the Civil Code to appoint persons other than the directors or managers of the corporation, at the time of its dissolution, to settle its affairs does not authorize the court to take upon itself the power to settle its affairs or to appoint a receiver for that purpose." It must be apparent that if said section is the measure of authority in the premises, then no superior court other than that designated has jurisdiction to make such appointment, and since it appears in the complaint that said corporation was dissolved, it should further appear, so it is contended, that it did business or had its principal place of business in Alameda County. To the contrary, it appears that it had its "several offices and places of business" in San Francisco, Los Angeles, and Portland, Oregon. It must have carried on its business at its places of

business and, therefore, it is argued, the jurisdiction of the subject matter is in those counties.

Of course, when the legislature provides that the superior court of a certain county has authority to appoint a receiver, by necessary implication it excludes every other, and the section would have no additional significance if it read: "The superior court of the county in which the corporation carries on its business or has its principal place of business and *no other* superior court . . . may appoint," etc. As to this contention respondents argue that "A fair interpretation of the language will show that nothing is accomplished by this act, than the mere assertion of jurisdiction which already existed independently of the statute and already resided just where the statute in terms placed it, to wit, in a court of equity. The original jurisdiction of equity gains nothing and loses nothing by the statute. It leaves the matter just where it found it, with powers as full and ample after its passage as they were before its enactment. We come now to a consideration of the words 'upon the dissolution.' . . . This language taken from section 18 of the act of 1850 [Stats. 1850, p. 349], to be understood in its full import, requires construction along the lines employed by courts in the interpretation of statutes, where there is any doubt as to its meaning. What is the meaning of the words, 'upon the dissolution of any corporation'? Ordinarily the word 'upon' is used in the same sense as 'on,' and the word 'on' is defined by Webster as meaning 'at the time of, with reference to some cause or motive; by virtue of; in consequence of; as on the ratification of a treaty, the armies were disbanded.' Read in connection with other words of the statute of 1850 from which it was taken, 'this section has a meaning entirely different from the meaning it has when standing alone. 'It is an established rule, in construing a statute, that the intention of a law-giver and the meaning of the law are to be ascertained by viewing the whole and every part of the act.' (Brown's Legal Maxims, p. 445.)

"Recurring to the statute of 1850, it will be seen that there was a scheme provided, complete in itself, for dissolving and winding up a dissolved corporation. The act treated of three methods of dissolution, one by direct act of the legislature; another by *quo warranto*, and a third by voluntary act of the corporation itself. Each of these supposed, and of necessity were, to act upon a living, going concern, one with a 'domi-

cile' in the state, by necessary construction, and with a place of business in some county within the state's territorial limits by its own selection. It was in co-ordination with these several methods of dissolution that the other sections of the statute were designed to act. These other sections are numbered 16, 18, and 31, which became, respectively, section 400 of the Civil Code, sections 565 and 803 of the Code of Civil Procedure, and sections 1227 to 1233 of the same code. . . . But there was one class of dissolution, for which no provision was made in the act of 1850, and, consequently, none in the codes. That is a case of dissolution by 'expiration of charter.' Dissolution by expiration of charter is the class to which the present case belongs. Nothing in the act of 1850 belonged to this class. . . . These initial words of section 16, 'Upon the dissolution of a corporation, *unless other persons shall be appointed* by the legislature, or by some court of competent authority,' were, excepting those in italics, all eliminated from section 400, when it was taken into the Civil Code; and it needs no great amount of insight to discern that the eliminated phrases confined the statute as originally passed to the methods of 'dissolution' provided for in other parts of the same act. This section must be construed *noscitur a sociis*, just as its lineal descendants, sections 400, 565, 803, and 1227 to 1233 must be construed.

"Now, what is the object of the foregoing analysis, and what application has it to the present case?

"Turn for a moment to the complaint and read: 'Said Palmer Oil Company on or about the 28th day of March, 1913, was dissolved by the expiration of its charter,' and 'filed October 9, 1913'; and it will appear that there intervened between the dissolution of Palmer Oil Company and the commencement of the action, the date of the application for the appointment of the receiver, about seven months.

"On the 28th of October, 1913, Palmer Oil Company ceased to exist. It died a natural death, and could no more have a 'principal place of business' or be 'carrying on business' seven months after its death, than could a rat survive the sinking of the ship that carries it.

"In the case of *Crossman v. Vivienda Water Co.*, [150 Cal. 575, 89 Pac. 335], the status of all dissolved corporations was defined by the supreme court in these words: 'It is settled beyond question that, except as otherwise provided by statute,

the effect of a dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text-writers agree, and their statement is supported by an overwhelming weight of authority.'

"How, may we ask, could Mr. York, who verified the complaint in this case, swear that on the 9th day of October, 1913, the Palmer Oil Company 'carries on its business,' or 'has its principal place of business' in Alameda County?

"Will the court construe 'carries on its business' or 'has its principal place of business' into 'carried on its business' or 'had its principal place of business'? The answer is, *ita lex non scripta est*. Would it not be a healthier construction, one in harmony with the fact and the law, to say, 'a dissolved corporation carries on no business, has no principal place of business in any county of the state,' and leave the application of the wronged stockholder, to be made to any superior court, holden in any county of the state, and leave the consequences of such an application to the effect of that other law, written all over the decisions of the supreme court, that a court of general jurisdiction having jurisdiction of the subject matter, first applied to, will retain jurisdiction for all purposes?"

There is plausibility in the views thus expressed, but to adopt them would be to violate, as we conceive, the plain provisions of the statute.

In the first place, there is no safe ground for holding that said section 400 of the Civil Code and section 565 of the Code of Civil Procedure were intended to apply in case of dissolution by and according to any particular method. No such indication is shown by the head-notes, the context or the body of the sections. The familiar rules of interpretation preclude any such contention. "Upon the dissolution" necessarily implies *dissolution* effected in any manner. It is the fact of *dissolution*, the termination of the existence of the corporation as such, that the statute contemplates. It matters not whether the dissolution is the result of the operation of law, the voluntary act of the parties, or is accomplished through *quo war-*

ranto proceedings—the legislature has seen fit to make no distinction as to the county wherein a receiver must be appointed, if at all. And it may be said that no reason is apparent why a distinction should be made. While the point has probably not been directly involved in any decision of the supreme court, it has at least been assumed that the section concerns both voluntary and involuntary dissolutions. For instance, in the Havemeyer case, *supra*, it was said that “Under section 400 of the Civil Code and 565 of the Code of Civil Procedure, *both of which refer to voluntary as well as involuntary dissolutions of corporations*, the administration and distribution of the assets of a dissolved corporation is left, as a rule, to the directors in office at the date of dissolution, though such dissolution be upon judgment of forfeiture; and the appointment of a receiver is an exception to the mode only in cases of neglect of duty or abuse of power by the directors when required for the protection of the rights of a creditor or stockholder.”

Nor can we perceive the force of respondents' contention that the section does not apply where the corporation has been dissolved for a considerable period of time. If dissolution had occurred one day before the application for the appointment had been made, would respondents still contend that the section was inoperative? Or, if only a few hours had intervened, would the case call for a different rule? We think it would be a strained construction to hold that if the application for the appointment of a receiver is not made at the very instant of dissolution, we must not look to the said section 565 for guidance. It is at least perfectly clear that “upon dissolution” does not mean “before dissolution.” The phrase undoubtedly means “after dissolution,” and it is not limited to any particular lapse of time. It may include an application made immediately following the dissolution or one separated by quite a period of time.

Of course, after dissolution the corporation is not “alive,” and it is not strictly accurate to say that it has a place of business. But if the section is to have any application at all, it must be in a case of dissolution, as by no possible construction can it refer to the appointment of a receiver for a going concern. The obvious conclusion is that the legislature contemplated the appointment of a receiver after dissolution at

the place where the corporation had its principal place of business or did business at the time of the dissolution.

Nor can we see any obstacle to the acceptance of this view in any provisions of the constitution. Said instrument clothes the superior court with original jurisdiction in cases of equity, and if it be said that the appointment of receivers is a branch of its equity powers, there is no inhibition upon the legislature locally to limit the exercise of this jurisdiction as provided in said section. Nor should the declared inconvenience of such course receive more than scant consideration. Whether it is convenient or as easy as some other course to comply with the terms of a statute is not regarded as a sufficient reason for disregarding its mandates. But it should not be difficult to ascertain where a corporation has had its principal place of business at the time of its dissolution. There is virtually such an allegation here, and respondents no doubt found it easy to make it, otherwise it would not appear, as they seem to attach to it very little importance.

It may be that the complaint could be amended so as to support an appointment made by the superior court of Alameda County, but, as the question is presented here, under the decisions of the supreme court and the language of said section as we understand them, the superior court is without authority to make such appointment.

There is much discussion in the briefs as to whether it is a suitable case for a receiver. We have examined the authorities in the light of the allegations of the complaint and we feel satisfied that a sufficient showing was made to authorize this exceptional proceeding. Manifestly, as Chief Justice Beatty said in the Havemeyer case, such step should not be taken unless necessary for the protection of the rights of creditors or stockholders, and it may be said, also, that, ordinarily, notice should be given before a receiver is appointed, but, in view of the allegations of the complaint, we cannot say that as to these considerations the court was at fault.

We think, though, the order should be reversed, and it is so ordered.

Chipman, P. J., and Hart J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 22, 1916.

[Crim. No. 319. Third Appellate District.—January 22, 1916.]

**THE PEOPLE, Respondent, v. CARL OTTO FORESTER,
Appellant.**

PARENT AND CHILD—CONVICTION FOR NONSUPPORT—PROOF OF ABILITY.—

In order to support a conviction of a parent for failure to support his minor children, it is essential that proof of his ability so to do be made, as inability without fault is a "lawful excuse," within the meaning of that phrase as used in section 270 of the Penal Code.

ID.—INABILITY TO SUPPORT—EVIDENCE—BUSINESS REVERSES AND PERSONAL INJURY.—Inability due in part to an injury to the hand of a skilled dentist and in part to business reverses, without any ground for inference that his financial embarrassment was the result of artifice or any design to deprive his children of support, is a sufficient showing of lawful excuse for failure to discharge such parental duty.

APPEAL from a judgment of the Superior Court of Shasta County, and from an order denying a new trial. J. E. Barber, Judge.

The facts are stated in the opinion of the court.

Carr & Kennedy, and Charles T. King, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—Appellant was convicted of a violation of section 270 of the Penal Code, in that he "willfully omitted without lawful excuse to furnish necessary food, clothing, shelter and medical attendance for his three minor children by his divorced wife."

Many points are made by appellant, but as we are satisfied that the cause must be reversed for a failure of proof as to a vital element of the crime charged, it is probable that the other questions will not arise again, and we therefore forego any discussion of them.

It is admitted by the attorney-general that it should be made to appear that the father has the ability to supply what is needed or else a conviction is not supported. Indeed, it is apparent that inability without fault is a "lawful excuse"

for the failure to discharge this parental duty. "While it is the duty of a parent to support his children of tender years, yet in order that he be imprisoned for failure to obey an order of the court in connection therewith, it must affirmatively appear that he has the ability to comply with the order of the court." (*In re McCandless*, 17 Cal. App. 222, [119 Pac. 199].) In that case the petitioner had been committed to the custody of the sheriff on account of his failure to make certain monthly payments directed by the superior court for the support and maintenance of his minor children. As to the question involved, though, the principle is the same. Therein is cited *In re Cowden*, 139 Cal. 244, [73 Pac. 156]; *Ex parte Cohen*, 6 Cal. 319; *Ex parte Rowe*, 7 Cal. 175; *Ex parte Silvia*, 123 Cal. 293, [69 Am. St. Rep. 58, 55 Pac. 988], which are to the same effect.

In *State v. Garrison*, 129 Minn. 389, [152 N. W. 762], the supreme court of Minnesota set aside a verdict in a prosecution for nonsupport for the reason that the proof failed to show the ability of the defendant to meet his obligation, the court saying: "The only defense to this prosecution is his inability to perform this duty. That such inability caused by illness is a legal excuse for the failure to furnish support to a wife or children is not open to doubt."

In *State v. Bess*, 44 Utah, 39, [137 Pac. 829], in a prosecution under a statute similar to our own, the judgment was reversed for the same reason, it being said: "We think the evidence wholly fails to show willful neglect on his part as contemplated by the statute to provide for and support the children mentioned in the information. True, evidence was introduced showing that he failed to contribute anything for their support; but the evidence also shows that the current and necessary expenses of himself and two boys far exceeded his earnings during the time covered by the information, hence his neglect in that regard was not without 'just excuse.'"

In *Goddard v. State*, 73 Neb. 739, [103 N. W. 443], the prosecution was under a statute penalizing wife desertion and willful neglect to provide for her or for the minor children, and the supreme court of Nebraska held that "In such case, in order to sustain a conviction the state must prove that the accused is possessed of money, property or other means available for the support of his wife or, if he is without such

means, that he has at least some earning capacity, and his refusal without good cause, to maintain or provide for her."

The showing here was without conflict that the defendant did not have the ability to support his children. This was due in part to business reverses and in part to a disability arising from an injury to his hand. It is true that he was and is a skilled dentist, but he had few patients and was unable to serve those. He could not even pay his rent. His former wife was unable to find any property upon which to levy to satisfy a judgment in her favor. There is no evidence that defendant was willfully idle or that he was prodigal in his expenditures. There is no just ground for the inference that his financial embarrassment was the result of artifice or any design to deprive his children of the attention and support to which they were entitled. Deliberate and fraudulent inability would, of course, be considered unavailing as a defense to the charge. We are not, however, at liberty to infer that appellant was not acting in good faith. True, another marriage and the birth of another child added to his burdens, but this consideration involves nothing culpable or even immoral. It rather suggests a reason why care should be exercised in applying the severe penalty of a statute which, as suggested by appellant, is "intended to prevent destitution and not to produce hardship in or destruction of the home." In this connection it is deemed appropriate to quote from the concurring opinion of Mr. Justice Frick in the Bess case, *supra*, as follows: "In view of this, it would be a somewhat peculiar administration of the law in question, to say the least, if it should be held that Mr. Bess should be punished for what he was utterly unable to prevent. Moreover, to imprison him could result only in depriving the little boys of their means of support. Such a result would be more or less tragic for them, to say the least. . . . While the law in question is salutary, it nevertheless is of that character which requires it to be administered with some care so as to not produce more mischief by its enforcement in certain cases than can be prevented thereby."

Before concluding, it is not deemed amiss to say that the evidence shows that said children have been cared for and all their wants supplied by their grandparents. While we are not called upon to hold, as held by the courts of some jurisdictions, that this constitutes a complete defense to the

charge, yet we may remark that this beneficent circumstance naturally tends to obviate any reluctance to accord to appellant the full benefit of his impecunious condition.

We think the judgment and order should be reversed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1480. Third Appellate District.—January 24, 1916.]

JOSEPH J. BULLOCK, Respondent, v. MAY E.
BULLOCK, Appellant.

APPEAL—FAILURE TO FILE BRIEF—DISMISSAL.—Where the respondent on an appeal neither files his brief nor appears at the oral argument, although served with a notice that appellant would move for a reversal of the order appealed from without consideration of the cause upon its merits, upon this ground, the order appealed from will be reversed.

APPEAL from an order of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Stanislaus A. Riley, for Appellant.

C. W. Eastin, for Respondent.

BURNETT, J.—Appellant filed her brief in the supreme court on the thirty-first day of August, 1914. The cause was thereafter transferred to this court and came on regularly for hearing on the nineteenth day of this month. Respondent has never filed any brief, either in the supreme or this court nor did he appear at the oral argument. He was regularly served with notice that on said nineteenth day of January, 1916, appellant would move this court "for an order reversing the order appealed from without consideration of the cause upon its merits . . . upon the ground that respondent has not filed his points and authorities herein." As stated, there was no appearance by respondent.

The order appealed from is therefore reversed on the authority of *Richter v. Fresno Canal & Irr. Co.*, 101 Cal. 582, [36 Pac. 96]; *Davis v. Hart*, 103 Cal. 530, [37 Pac. 486]; *Kelly v. Bradbury*, 104 Cal. 237, [37 Pac. 872].

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1764. Second Appellate District.—January 26, 1916.]

W. T. S. HAMMOND, as Administrator, etc., Respondent, v.
THE UNITED STATES FIDELITY & GUARANTY
COMPANY (a Corporation), Appellant.

UNDERTAKING ON APPEAL—STAY OF EXECUTION—LIABILITY OF SURETY.

The liability of a surety on an undertaking on appeal given to stay the execution of a judgment for the return of specific personal property, or its value, and for a certain sum of money, is not extinguished, in so far as the money judgment is concerned, by the turning over to the appellant upon affirmance of the judgment of all property belonging to appellant in respondent's hands, including an amount in cash in excess of the amount of such money judgment, where it is shown that some of the property was disposed of by respondent pending the proceedings, and that upon applying the money upon the demands held by the appellant there still remained a balance due upon the judgment.

ID.—AMOUNT OF UNDERTAKING—AGREEMENT OF PARTIES.—An undertaking on appeal from a judgment for the delivery of personal property, or its value, and for a fixed amount of money is not void, because of the fact that the amount of such undertaking was fixed by the parties, instead of by the court, as the surety is bound by the statement in its contract, and cannot question the truth of such recitals.

ID.—ESTOPPEL OF SURETIES.—When the party in whose favor the undertaking was executed has had the benefit of a stay of execution, the surety cannot be heard to say that the undertaking was void because all the forms of the statute, through its omission, were not complied with.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Gray, Barker & Bowen, Flint, Gray & Barker, and William A. Bowen, for Appellant.

Hunsaker & Britt, and W. N. Goodwin, for Respondent.

JAMES, J.—An appeal has been taken from the judgment entered in this action in favor of the plaintiff and against the defendant, and from an order denying a motion made by the defendant for a new trial. The suit is upon an undertaking given on appeal to stay execution.

At a time prior to the institution of this action, Merrill A. Weir died, and prior to the conclusion of probate proceedings in his estate his wife, Nancy A. Weir, died. Administrators were appointed in both estates, and the administrator of the estate of Nancy A. Weir took into his possession property of considerable value which he claimed belonged to that estate and which, on the other hand, the administrator of the estate of Merrill A. Weir claimed was property upon which he was entitled to administer as belonging to the estate of Merrill A. Weir. Upon the refusal of the administrator in the wife's estate to deliver the property to the administrator of the estate of Merrill A. Weir, the latter brought an action to recover a money judgment and certain securities and corporate stocks. In that action he obtained judgment for the return of the personal property or its value, and also judgment for the sum of \$4,687.63, with costs. An appeal was taken from that judgment to the supreme court and thereafter the judgment was affirmed. In order to stay execution pending appeal an undertaking was given, with the appellant here as sole surety. That undertaking recited in part that the surety bound itself in the sum of twenty thousand dollars (we here quote from the language of the bond) "(that being the amount agreed upon by the parties for the staying of the execution of said judgment), that if the said judgment or any part thereof be affirmed, or the appeal be dismissed, the appellant will deliver to the plaintiff the personal property described in the judgment or its value as therein fixed, and will pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal." The undertaking further provided that upon the going down of the *remittitur*,

the court from which the appeal was taken might enter judgment against the surety. It appeared in evidence that pending the proceedings in the action referred to, the administrator of the estate of Nancy A. Weir disposed of some of the personal property described in the judgment, and also made use of other property which came into his hands as a part of the alleged estate of Nancy A. Weir. After the affirmance of the judgment was made, the administrator of the estate of Nancy A. Weir turned over to the administrator of the estate of Merrill A. Weir all of the property in his hands. This included property other than that mentioned in the judgment; it being conceded as between the administrators that this additional property was a part of the community estate of the two decedents. In other words, we find no question made but that, in so far as property additional to that described in the first judgment was delivered to the administrator of the estate of Merrill A. Weir, that was property to which the administrator of the latter estate was legally entitled. The attorney for the administrator in the Nancy A. Weir estate, referring to this additional property, testified as follows: "I had long ago had a talk with Judge Britt substantially to the effect that we might as well consider all those things as being a part of the entire community property, and let it be determined by the judgment in the cases that were then pending, without the necessity of Judge Britt bringing new suit to recover those other amounts." According to the computation made by the respective administrators at the time this property was turned over, while a total amount in cash of \$12,383.21 was paid, applying this money upon the several demands held by the administrator of the estate of Merrill A. Weir, left a balance due on the judgment entered in the action in which this surety gave the stay bond, of the sum of \$3,274.34. It is the contention of the appellant that, inasmuch as an amount in cash in excess of the total amount of the money judgment was paid over, the money judgment, which was a part of that for the payment of which it became surety, should be treated as extinguished. We have already noted that it appears that all of the money and property turned over was money and property to which the administrator of the estate of Merrill A. Weir was entitled. The estate of Merrill A. Weir certainly had the right to apply the property and money received in such a way as would

extinguish such indebtedness due it and leave whatever deficiency there was owing secured by the undertaking which this appellant gave. We mean by this that the administrator of the estate of Nancy A. Weir, having paid only a part of his obligations and those obligations not being the total of the obligation guaranteed by the appeal bond given by appellant, it must result that there was a liability for the deficiency which might be enforced against the surety. As to some of the personal property of which the judgment appealed from in the action of the one administrator against the other required a delivery, either of the property itself or its value, which latter was fixed, a sale had been made in the Nancy A. Weir estate. Some of this property, it is said, was sold for a price in excess of that fixed as representing its value in the judgment. The accounting made by the administrator of the Nancy A. Weir estate to the other administrator included amounts representing the proceeds of such sales. It cannot be told from the examination which we have made of the testimony whether the overplus represented by such sales was credited on the amount of the money judgment secured by appellant's bond. However, it seems immaterial, for had the administrator of the estate of Nancy A. Weir disposed of such property and satisfied the money judgment entered against him, retaining in his hands the excess of money derived from the sale of such property, there seems to be no reason why this excess might not have been recovered from him in a separate action. A great deal of the argument on the part of appellant refers to a certain memorandum of agreement which it is claimed was made between the administrators at the time of the alleged accounting, in which it was agreed that the administrator of the estate of Nancy A. Weir might offset the deficiency against the share in the property of the estate of Merrill A. Weir to which the former estate might be entitled. There is some conflict in the testimony as to whether this agreement was executed, and as to the fact, the determination of the trial court adverse to appellant's contention in that regard should be sustained. But even though it might be said that this conclusion was contrary to the evidence, and that the agreement was made as asserted by appellant, in our view it would be of no avail as pointing an argument in favor of appellant. Conceding, as we must, that the administrator of the estate of Merrill A. Weir was

entitled as a matter of law to all of the property, then he would be powerless to make any agreement which would postpone the time for the payment of that debt, or to provide by any agreement for a reimbursement to the estate of Nancy A. Weir. The law would either effectuate such a reimbursement or not, regardless of the agreement of the administrator.

We have to consider further certain questions relating to the validity of the undertaking given by the appellant, as the contention is advanced that no obligation was created thereby because the contract of suretyship was void. The main contentions in that regard may be discussed briefly. It is said, first, that as the judgment appealed from was in part for the recovery of personal property, the court should have fixed the amount of the undertaking, which is shown not to have been done. Second, that the undertaking is in a "lump" amount of twenty thousand dollars, and that, assuming it insufficient as a security for the delivery of the property required to be returned by the judgment, there is no legal way by which the amount may be divided so as to furnish a certain definite security for the money judgment. And generally, that in other matters of form the undertaking is not sufficient. In the first place, it is true that the statute does require a bond to be given, where a delivery of property is called for by the judgment, in such an amount as may be directed by the court; whereas in the case of a money judgment the amount for which the sureties are bound shall be double the amount named in the judgment. However, as to the first contention, that the court should have fixed the amount of the undertaking, it will be noted that the undertaking in its phraseology recites that the amount was agreed upon by the parties. It would seem hardly open to question that in lieu of having the amount of the undertaking fixed by the court, the parties may be permitted to stipulate as to what that amount shall be. The sureties are bound by the statements in their contract, and cannot question the truth of such recitals. (*Ogden v. Davis*, 116 Cal. 32, [47 Pac. 772]; *Smith v. Fargo*, 57 Cal. 157.) It has been further held that undertakings such as that considered here need not be in precise conformity with the statutory rules, which requirements may be waived. (*Murdock v. Brooks*, 38 Cal. 596; *Moffat v. Greenwalt*, 90 Cal. 368, [27 Pac. 296].) In the latter case, citing *Murdock v. Brooks*, *supra*, it is said: "When

the party in whose favor the undertaking was executed had had the benefit of a stay of execution, the sureties could not be heard to say that the undertaking was void because all the forms of the statute, through their omission, were not complied with." The supreme court has further held that, even though the conditions mentioned in an undertaking are more onerous than those required by the statute, the bond may be valid as creating a common-law obligation. (*Gardner v. Donnelly*, 86 Cal. 367, [24 Pac. 1072].) We should remember that the judgment for the return of the specific personal property was completely satisfied; hence there is no occasion to apportion any part of the amount named in the obligation of the surety to that account. Had the undertaking been given to secure the money judgment only and the requirement of the statute been observed, the amount for which the surety would have become bound would have been twice that of the money judgment. The deficiency for which this action required the surety to account was less than the full amount of the money judgment. We may assume, we think properly, that the parties, in so far as the money judgment was concerned, agreed upon an amount sufficient to cover that sum. If the terms of the statute were considered affecting the amount of undertakings to stay execution from money judgments, then the sureties were bound in that behalf in a sum double the amount of the judgment. In any event, no reason appears to us why it should not be said that the undertaking was in the sum of the obligation made of ample amount to cover the judgment for \$4,687.63.

A careful examination has been made of other contentions advanced on behalf of appellant, but we find no sufficient ground upon which to enter an order of reversal.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1692. First Appellate District.—January 28, 1916.]

F. J. LINZ, Respondent, v. McIVER & BECKER,
Copartners, Appellants.

PLEADING — VARIANCE BETWEEN ALLEGATIONS AND EXHIBIT — WAIVER.—

A variance between the direct allegations of a complaint and a copy of an instrument set forth therein, or an exhibit attached thereto, can be successfully attacked only by special demurrer, and cannot be taken advantage of by general demurrer.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Donohue, Judge.

The facts are stated in the opinion of the court.

Robison & Sizer, for Appellants.

J. R. Moulthrop, for Respondent.

THE COURT.—In this action the plaintiff and respondent, F. J. Linz, procured a judgment to be entered against the defendant F. G. Becker upon the latter's default. The judgment purports to run against him individually and not as a member of the copartnership. The general allegations of the complaint were sufficient in the absence of a general demurrer to charge the defendant as an individual maker of the promissory note sued upon. The complaint, however, contains a copy of the note, which shows that defendant Becker signed his name thereto as a member of the firm of McIver & Becker and not as an individual maker thereof. The only question involved upon this appeal is whether the variance between the general allegation of the complaint and the face of the note is fatal to the plaintiff's judgment.

The rule in this state is that a variance between the direct allegations of a complaint and a copy of an instrument set forth therein, or an exhibit attached thereto, can be successfully attacked only by special demurrer, and cannot be taken advantage of by general demurrer. (*Mendocino County v. Morris*, 32 Cal. 145.) In the case of *Blasingame v. Home Ins. Co.*, 75 Cal. 633, [17 Pac. 925], the appellant therein relied for a reversal of the judgment upon a variance between a direct allegation of the complaint as to the identity of a per-

son to whom a policy of insurance was payable, and an apparently contrary statement in the copy of the policy set forth in the complaint. The court there held that the complaint was sufficient to support the judgment when tested by a general demurrer.

The most recent reaffirmance of the foregoing principle is to be found in *San Francisco Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 695, [106 Pac. 111], in which Mr. Justice Kerrigan, rendering the decision of the court, said: "Under the authorities in this state the variance between the exhibit and the allegations of the complaint cannot be raised by general demurrer, and as the point was not made by special demurrer the complaint must be held to be good"—citing *Mendocino County v. Morris*, 32 Cal. 145; *Palmer v. Lavigne*, 104 Cal. 30, [37 Pac. 775]; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, [17 Pac. 925].

Upon the record before us we are satisfied that the complaint is sufficient to support the judgment, and it is therefore affirmed.

[Civ. No. 1679. First Appellate District.—January 28, 1916.]

L. G. BRIZZOLARA, Respondent, v. CARLO O. SBRANA,
Appellant.

UNLAWFUL DETAINER—APPEAL—LACK OF ERROR.—It is held on the appeal in this case that the appellant having filed a brief in which not a single question of law or ground of alleged error is presented, and the court having examined the record and finding no error, the judgment and order appealed from should be affirmed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

Frank W. Sawyer, for Appellant.

Bacigalupi & Elkus, for Respondent.

THE COURT.—This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for a new trial.

The action is for unlawful detainer. The complaint sets forth specifically the alleged transaction out of which the relation of lessor and lessee arose between the parties, and makes the lease, as an exhibit attached thereto, a part of the complaint. The answer of the defendant denies specifically the averments of the complaint. The cause was tried before a jury upon the issues thus framed, and a verdict was rendered in the plaintiff's favor. A statement of the case was prepared and used on motion for a new trial, which is, however, brief, and which does not purport to contain all of the evidence in the case.

Upon this appeal from the judgment and order denying a new trial the appellant has filed a brief *in propria persona*, which, although quite voluminous, does not present a single question of law or ground of alleged legal error upon which to base a reversal of the case, but which is wholly devoted to the assertion and discussion of matters not embraced in the record and not before this court, and which does not present any showing of service upon the adverse party. To this brief the respondent—probably for the latter reason—has presented no reply. The court, thus unaided by either party, has examined the record before it, and from such examination has satisfied itself that no reversible error was committed by the trial court.

Judgment and order affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on February 25, 1916.

[Civ. No. 1641. First Appellate District.—January 28, 1916.]

FRED B. HILL, Respondent, v. P. NERLE et al., Appellants.

PLEADING—UNVERIFIED ANSWER—EFFECT OF—REMEDY OF PLAINTIFF.—

An unverified answer to a verified complaint does not admit all of the allegations of the complaint to be true in the absence of a seasonable objection to the failure of the defendant to verify his answer. The remedy of the plaintiff in such a contingency is to move the trial court to strike out the answer or for judgment upon the pleadings for want of an answer.

ID.—LACK OF VERIFICATION — TRIAL WITHOUT OBJECTION — WAIVER. —

Where the case goes to trial and is heard and determined upon the issues purporting to have been raised by the pleadings of the parties without a previous objection upon the part of the plaintiff to the lack of verification of the defendant's answer, the defect will be deemed to have been waived.

ID.—ACTION FOR GOODS SOLD AND MONEYS ADVANCED—UNVERIFIED ANSWER—TRIAL WITHOUT OBJECTION—UNWARRANTED JUDGMENT.—

In an action for goods sold and delivered and for moneys advanced for the payment of freight and transportation charges upon the goods, the failure of the defendants to verify their answer to the plaintiff's verified complaint is not sufficient to support a judgment for the moneys advanced as an admitted fact under the pleadings, where it is found that the defendants were not indebted therefor, and no motion to strike out the answer or for judgment on the pleadings was made, and the case was tried upon the pleadings as presented.

ID.—CERTIFICATE OF PARTNERSHIP—USE OF INITIALS.—A certificate of copartnership which sets forth the initials of the respective partners' given names instead of their names in full is sufficient.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

J. T. Summerville, T. G. Elliott, Nathan O. Coghlan, and Charles H. Hincken, for Appellants.

Fred L. Dreher, for Respondent.

THE COURT.—Appeal from judgment upon the judgment-roll alone.

The plaintiff's complaint in this action consisted of two counts: One for the sum of \$190.85, alleged to be the balance

due for goods sold and delivered by plaintiff's assignors to the defendants; the other for the sum of \$217.50, alleged to be due to the plaintiff's assignors from the defendant for moneys advanced for the payment of freight and transportation charges, etc., upon the goods alleged in the first count to have been sold and delivered to the defendants. The defendants answering denied generally and specifically all of the material allegations of the plaintiff's complaint. The complaint was verified; the answer was unverified. The case went to trial upon the pleadings as presented, and the trial court made its findings of fact, wherein it found that the sum of \$336.36 was due from the defendant for the goods sold and delivered, notwithstanding the fact that the complaint alleges in the first count that there was due for and on account of such sale only the sum of \$190.85. The trial court further found that the defendants did not, as alleged in the second count of the complaint, become indebted to plaintiff's assignors in the sum of \$217.50, nor in any other sum for moneys paid and advanced by plaintiff's assignors in payment of freight and transportation charges upon the goods found to have been sold and delivered to the defendants.

The plaintiff prayed for judgment in the sum of \$336.36, and that amount, it will be noted, is the aggregate of the sums, separately stated and set forth in each of the two counts of the complaint.

The point is now made in support of the appeal from the judgment that the judgment is not supported in its entirety by the findings as made, and therefore should be modified to the extent of striking therefrom the sum of \$217.50, which the court allowed in its judgment, but which it found was not owing by the defendants. Counsel for the plaintiff answers this contention by asserting that the defendants, having failed to verify their answer to the plaintiff's verified complaint, the allegations of the complaint with respect to the payment by plaintiff's assignors for the benefit of the defendants of the sum of \$217.50 for freight charges, etc., stand as admitted; and it is insisted that the finding, therefore, that the defendants were not indebted in any sum to the plaintiff's assignors for moneys advanced for transportation charges is contrary to an admitted fact in the case, and may be treated as surplusage, and the admitted fact of the complaint resorted to in aid and in support of the judgment.

We do not understand it to be a rule of pleading that an unverified answer to a verified complaint admits all of the allegations of the complaint to be true in the absence of a seasonable objection to the failure of the defendant to verify his answer. The remedy of the plaintiff in such a contingency is to move the trial court to strike out the answer or for judgment upon the pleadings for want of an answer (*McCullough v. Clark*, 41 Cal. 298), and we understand it to be the rule that if the case goes to trial and is heard and determined upon the issues purporting to have been raised by the pleadings of the parties without a previous objection upon the part of the plaintiff to the lack of verification of the defendant's answer, the defect will be deemed to have been waived. (*Greenfield v. Steamer Gunnell*, 6 Cal. 67; *McCullough v. Clark*, 41 Cal. 298; *People v. Reis*, 76 Cal. 269, [18 Pac. 309]; *City and County of San Francisco v. Itsell*, 80 Cal. 57, [22 Pac. 74].)

No motion to strike out or for judgment on the pleadings was made in the present case. The findings indicate with sufficient certainty that the case was tried and determined upon the issues purporting to have been made by the complaint and answer thereto, and consequently the plaintiff will not now be heard to complain of the want of a verification to the defendant's answer.

The finding of the trial court that the defendants were indebted to the plaintiff's assignors in the sum of \$336.36 for goods sold and delivered is not fully supported by the allegations of the complaint, and inasmuch as the trial court found that the defendants were not indebted to the plaintiff's assignors in the sum of \$217.50, it is obvious that the judgment entered upon the findings is excessive, and must be modified.

There is no merit in the contention that the judgment is not supported by the complaint or findings, for the reason, as claimed, that the complaint alleges that "a certificate stating the names in full of all the members of said copartnership, etc.," in compliance with sections 2466 and 2468 of the Civil Code, was filed and published, whereas it was found that the names in full of all the members of said copartnership were not set forth in said certificate. The findings show that initials were used in the certificate for the respective partners' given names, but they also show that said partners were generally known by the names as thus given, and it has been held that a certificate which states the names of each of the

partners with the initials by which they are generally known is sufficient. (*Meads etc. Co. v. Lasar*, 92 Cal. 221, [28 Pac. 935].)

For the reasons above set forth it is ordered that the judgment be modified by striking therefrom all in excess of the sum of \$190.85, and as thus modified it shall stand affirmed.

[Civ. No. 1720. First Appellate District.—January 28, 1916.]

ALEX BORGER, Respondent, v. **THE CONNECTICUT FIRE INSURANCE COMPANY** (a Corporation), Appellant.

FIRE INSURANCE—TIME OF PAYMENT—DENIAL OF LIABILITY—PROVISION OF POLICY NOT WAIVED.—A provision in a policy of fire insurance that the loss should not become due and payable until a certain time had elapsed after presentation of the proofs of loss, is not waived by reason of the denial of any liability upon the policy by the insurance company at the time of the presentation of the proofs of loss by the insured.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. **H. Z. Austin**, Judge.

The facts are stated in the opinion of the court.

Coogan & O'Connor, and **Drew & Drew**, for Appellant.

W. P. Thompson, for Respondent.

THE COURT.—This is an appeal from a judgment and order denying the defendant's motion for a new trial.

This cause was before the court upon a former appeal (24 Cal. App. 696, [142 Pac. 115]), wherein the facts of the case in so far as required for the consideration of that appeal and of the present one are fully set forth. Upon the former appeal the judgment and order were reversed upon the ground that according to the terms of the insurance policy in question relating to the time when the loss should become payable, the action had been prematurely brought. Upon such re-

versal the plaintiff filed an amended complaint, wherein it was set forth that the defendant, upon the filing with it by the plaintiff of his proofs of loss, had denied liability upon its policy for such loss. Upon the second trial on the added issue thus presented the plaintiff again recovered judgment, upon which and upon the denial of his motion for a new trial the defendant has again appealed.

The present case presents practically the same question that was presented and decided upon the prior appeal. The respondent contends, however, that the effect of the defendant's denial of liability upon its policy for the loss in question, which plaintiff pleaded and proved upon the second trial, was to render the defendant's obligation immediately due and payable, notwithstanding the stipulation in the policy that the loss should not become due and payable until a certain time had elapsed after presentation of the proofs of loss, the action having been begun within such time. The respondent has collated a large number of cases from other jurisdictions in which the rule is laid down that a denial of liability by the insurer renders the loss immediately payable, if payable at all. The appellant, however, maintains that such is not the rule in this state, citing the case of *Irwin v. Insurance Company of North America*, 16 Cal. App. 143, [116 Pac. 294], wherein the contrary rule is laid down. In that case, which was an action to recover upon an insurance policy similar to the policy in the instant case as to its stipulation respecting the ownership of the property, and the time when the loss should become payable, the court says: "Respondent contends that the condition of the policy as to the time of payment was waived by reason of the action of the defendant in refusing payment on the ground that plaintiff was not the owner of the premises and possessed no insurable interest therein, the contrary of which was clearly established by the evidence, and for the further reason that by its answer it denied liability generally. We cannot construe such denial of liability, either before or after suit, as a waiver of the definite time fixed by contract for the payment of the loss. No breach of contract existed at the time the suit was brought; there was no sum due or payable to plaintiff. The terms of the contract gave to defendant sixty days, during which time it had a right to retain and use the money necessary to liquidate the loss. Within this time the defendant could make independent inves-

tigations in order to determine its liability. The loss was not payable until the time specified. A different rule might apply had the policy provided only that no action should be maintained for a period of sixty days, but we are not advised that a denial of liability before maturity can be said to have the effect to mature an obligation before the date fixed in the contract for its payment. (*Tatum v. Acherman*, 148 Cal. 357, 360, [113 Am. St. Rep. 276, 7 Ann. Cas. 541, 3 L. R. A. (N. S.) 908, 83 Pac. 151].)"

We are unable to distinguish the *Irwin* case from the case at bar; and the fact that the supreme court has denied a petition for a rehearing renders the rule therein set forth binding upon this court, and constrains us to hold that the state of this case has not been changed by the plaintiff's said amendment to his complaint or by the retrial of the cause, and that the action must still be held to have been prematurely brought.

For the foregoing reasons, and upon the authority of *Irwin v. Insurance Co. of North America*, 16 Cal. App. 143 [116 Pac. 294], and *Borger v. Connecticut Fire Ins. Co.*, 24 Cal. App. 696, [142 Pac. 115], the judgment and order are reversed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 27, 1916.

[Crim. No. 441. Second Appellate District.—January 28, 1916.]

THE PEOPLE, Respondent, v. GEORGE ECTON,
Appellant.

CRIMINAL LAW—EXAMINATION OF TALESMEN—PEREMPTORY CHALLENGE.

The limitation of examination of jurors on their *voir dire* for the purpose of exercising a peremptory challenge is very completely within the discretion of the judge, and defendant is not entitled to embark in a general exploration for the sole purpose of satisfying himself whether it would be safe to try the case before a juror against whom no legal objection can be urged.

1D.—CROSS-EXAMINATION—LIMITATION OF.—Refusal to allow defendant's counsel to cross-examine a witness with respect to his testimony at

the preliminary examination in a murder case, which affected only the form of the questions and did not deny the right to ask appropriate questions showing contradictions and inconsistencies, is not erroneous.

1D.—ARGUMENT—READING NEWSPAPERS.—In such a case refusal of the court to allow the reading in argument of extracts from newspapers is not erroneous where the record fails to show what the offered extracts were, or what relation, if any, they might have had to the subject matter of the case.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

E. M. Barnes, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

CONREY, P. J.—The defendant was convicted of the crime of murder and sentenced to imprisonment for life. The appeal is from the judgment and from an order denying his motion for a new trial.

The alleged errors complained of by appellant are that the court improperly limited his counsel in the examination of jurors; that the court refused to permit him to ask certain questions in cross-examination of one of the state's witnesses; and that the court refused to allow appellant's counsel in his argument to the jury to read to the jury, by way of illustration, "extracts from the daily papers of Los Angeles," which extracts were not in evidence.

On the first point, it is insisted that counsel was entitled to ask the questions for the purpose of obtaining information which would enable him to determine whether he would or would not exercise a peremptory challenge. The limitation of examinations of jurors on their *voir dire* for that purpose is very completely within the discretion of the judge, and defendant is not entitled to "embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be urged." The rulings were correct. (*People v. Edwards*, 163 Cal. 752, [127 Pac. 58].)

The court's refusal to allow defendant's counsel to cross-examine the witness Stevens with respect to his testimony at the preliminary examination affected only the form of the questions, and did not go to the extent of denying the right to ask appropriate questions showing contradiction or inconsistency between the testimony of Stevens at this trial and that given by him at the preliminary examination.

As to the refusal of the court to allow the reading in argument of extracts from newspapers, it need only be said that the record fails to show what the offered extracts were or what relation, if any, they might have had to the subject matter of this case. The "suggestion of diminution of the record," attempted to be made by counsel, is wholly insufficient.

The judgment and order are affirmed.

James J., and Shaw, J., concurred.

[Civ. No. 1695. First Appellate District.—January 28, 1916.]

SAMUEL KIERSKI, Respondent, v. THE LICK COMPANY, Appellant.

CONTRACT—SERVICES OF ATTORNEY—SUFFICIENCY OF EVIDENCE.—In this action to recover for attorney's fees it is held that the findings support the judgment of the trial court as to the services rendered after defendant's incorporation and as to their value.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Abram M. Marks, for Appellant.

J. C. B. Hebbard, and George Lezinsky, for Respondent.

THE COURT.—This is an action to recover judgment for the value of services rendered by an attorney at law.

From the evidence it appears that a portion of the services embraced in the claim of plaintiff against the defendant were rendered prior to the incorporation of the defendant, the

remainder of the services being rendered thereafter. The court in its findings limited the recovery to the services rendered to the defendant after its incorporation. It follows that the contention of the defendant that the evidence shows without conflict that the services were rendered prior to the incorporation of the defendant, and to an individual and not the corporation, is not borne out by the record. Lacking basis in fact this contention of the appellant is without merit; as is also its further contention that the finding as to the value of the services is not supported by the evidence.

The evidence amply sustains the findings of the trial court, and we find no error in the court's rulings upon the admission of evidence.

Judgment affirmed.

[Civ. No. 1644. First Appellate District.—January 28, 1916.]

GRACE GILBERT, Respondent, v. **W. R. ODOM et al.**,
Defendants; **THE UNITED STATES FIDELITY &
GUARANTY COMPANY** (a Corporation), Appellant.

ACTION TO RECOVER BAIL MONEY — COUNTERCLAIM — CONFLICTING EVIDENCE.—In an action to recover certain bail money, where the defendant attempts to offset the value of certain services, and the evidence is conflicting, the decision of the trial court will not be disturbed on appeal.

APPEAL from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

George Cosgrave, for Appellant.

W. D. Crichton, and **C. K. Bonestell**, for Respondent.

THE COURT.—This is an action to recover the sum of five hundred dollars, which was deposited by the plaintiff with the defendant W. R. Odom, a justice of the peace in Fresno County, as bail for the release of one Maggie Taylor, who was charged with a misdemeanor. Upon trial Maggie Taylor was acquitted and the bail exonerated. In the present action

the court gave judgment for the plaintiff and against the defendants in the sum sued for, with interest and costs. The appeal is by the surety company upon the official bond of defendant Odom.

At the trial Odom claimed that he rendered services to the plaintiff in the matter of securing a liquor license, and also in procuring, or attempting to procure, the removal of a certain marshal whose activities in the performance of his duty were obnoxious to her and detrimental to an enterprise conducted by her in Coalinga, and that it was understood and agreed by plaintiff and him that he should in payment for those services retain the value thereof out of the bail money on deposit with him.

While perhaps it may be said that the trial court should have been more liberal in its ruling on the admission of evidence on the cross-examination of Odom, still we are unable to say that any substantial error was committed in that regard.

Concerning the evidence in the case, it is sufficient to say that there is a conflict therein, in view of which, under well-settled law in this state, this court will not disturb the finding of the trial court.

Judgment affirmed.

[Civ. No. 1753. First Appellate District.—January 28, 1916.]

S. LAGUDIS, Respondent, v. LONDON ASSURANCE CORPORATION, Appellant.

ACTION ON INSURANCE POLICY—PREMATURE ACTION.—It is held in this action upon a policy of insurance that the judgment and order appealed from should be reversed upon the authority of *Borger v. Connecticut Fire Ins. Co.*, 24 Cal. App. 696, and *Irwin v. Insurance Co. of North America*, 16 Cal. App. 143.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. H. Z. Austin, Judge presiding.

This is an action to recover on a policy of fire insurance. The policy provided that any loss thereunder should be pay-

able in thirty days after the amount thereof had been ascertained either by agreement or by appraisal; but if such appraisal was not had or made within sixty days after receipt by the company of the preliminary proof of loss, then the loss should be payable in ninety days after such receipt. The fire occurred on July 23, 1913. No ascertainment of loss by agreement or by appraisal was alleged in the complaint and the proof of loss was received by the company on August 4, 1913. The complaint was filed August 28, 1913, and it was contended that the action was prematurely brought, because the policy did not become payable until ninety days after proof of loss to it until November 2, 1913.

H. A. Thornton, and Chickering & Gregory, for Appellant.

N. Lindsay South, for Respondent.

THE COURT.—This is an appeal from the judgment and order denying the defendant's motion for a new trial.

The facts in this case are in all essential particulars similar to the facts in the case of *Borger v. Connecticut Fire Ins. Co.*, 24 Cal. App. 696, [142 Pac. 115], and the condition of the policy of insurance sued upon, as to the time when the loss shall become payable, is identical with the terms of the policy in that case. This action was also brought prior to the time when the loss would become payable had expired, and the contention that this action was prematurely brought stands upon the threshold of this case upon appeal as in the *Borger Case*, and in the case of *Irwin v. Insurance Co. of North America*, 16 Cal. App. 143, [116 Pac. 294], to which our attention has been directed. We cannot distinguish between the facts of those prior cases and those of the case at bar, or the law applicable thereto as in said former cases laid down; and this being so, a discussion of the other questions presented upon this appeal is unnecessary at this time.

Upon the authority of *Borger v. Connecticut Fire Ins. Co.*, 24 Cal. App. 696, [142 Pac. 115], and *Irwin v. Insurance Co. of North America*, 16 Cal. App. 143, [116 Pac. 294], the judgment and order are reversed.

[Civ. No. 1726. First Appellate District.—January 23, 1916.]

W. J. FOSTER, Respondent, v. NATIONAL ICE CREAM COMPANY, Appellant.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE — REQUIREMENTS OF AFFIDAVIT.—In support of a motion for a new trial on the ground of newly discovered evidence, it is incumbent on the moving party to show the diligence employed in preparing for the first trial, how the alleged new evidence was discovered, and why it was not discovered before the first trial, and such other facts as will make it clear to the court that the failure to produce the alleged newly discovered evidence and present it at the first trial of the case was not attributable to the fault or want of diligence of the party, and where the affidavit fails to show these things, it is insufficient.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. William H. Donohue, Judge.

The facts are stated in the opinion of the court.

George K. Ford, for Appellant.

H. L. Breed, and Walter J. Burpee, for Respondent.

THE COURT.—This is an action for goods sold and delivered. Judgment was entered against the defendant. Its motion for a new trial was denied, and the appeal is from the judgment and the order. The only point made in support of the appeal is that the court erred in denying the motion for a new trial, because the allegation of the defendant's affidavit filed in support thereof asserting the existence of newly discovered evidence was uncontradicted. Conceding this to be so, there was no showing in the affidavit referred to of due diligence on the part of the defendant which would warrant the granting of a new trial on the ground of newly discovered evidence.

This was conceded at the oral argument. In support of its motion for a new trial upon the ground of newly discovered evidence, it was incumbent upon the defendant to show the diligence employed by it in preparing for the first trial, how the alleged new evidence was discovered, and why it was not

discovered before the first trial, and such others facts as would make it clear to the court below that the failure to produce the alleged newly discovered evidence, and present it at the first trial of the case, was not attributable to the fault or want of diligence of the defendant. The affidavit presented in support of the motion for a new trial was clearly deficient in the particulars just stated, and, therefore, in so far as the ground of newly discovered evidence was concerned, a new trial was rightfully refused.

No error appearing upon the face of the record before us, it is ordered that the judgment and order appealed from be affirmed.

[Civ. No. 1627. First Appellate District.—January 28, 1916.]

M. L. MAYERS, as Trustee, Respondent, v. SAN FRANCISCO CORNICE COMPANY, Incorporated, Appellant.

CONTRACT—COVERING METAL DOORS—SUFFICIENCY OF EVIDENCE.—In this action to recover for services in covering with leather metal doors, the judgment of the lower court is affirmed upon the sole question as to whether certain instructions were given to the company performing the services.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Stanley A. Smith, Judge presiding.

The facts are stated in the opinion of the court.

James P. Sweeney, for Appellant.

Henry A. Jacobs, for Respondent.

THE COURT.—This is an action brought by the plaintiff, as assignee for the benefit of the creditors of J. Frank & Co., a corporation, against defendant for \$425, claimed to be the balance due under two separate contracts for covering with leather a number of metal doors of the University of California.

Plaintiff's assignor, being the lowest bidder as a subcontractor for the work, a contract was entered into between it and the defendant whereby the former was to do the work for the sum of \$650. While the contract called for the work to be done strictly according to specifications, there were in fact no specifications, and the work was to be done according to oral instructions. The manager of the subcontractor, it further appears, as well as others interested in the work, regarded it as somewhat experimental. He felt doubtful whether, even if he followed the instructions given, the work would prove satisfactory to the defendant, and therefore proposed that one door should first be completed, so that they might be better able to judge if the method proposed to be followed was suitable. This was done, and the door as thus covered was pronounced satisfactory by the defendant and the architect of the building, whereupon the remainder of the work was performed in the same manner, and the doors were all immediately installed. About three weeks later the leather commenced to peel off, and after some negotiations the subcontractor and the defendant entered into a second contract, which was in all particulars like the first one, except that under it the subcontractor was to do the work for a little more than one-half the original contract price, viz., \$375. Upon removing the leather from some of the doors the defendant claims that it learned for the first time that the leather had not been placed thereon according to instructions and to the understanding between it and Frank & Co., in the particular that the doors had not first been covered with canvas, to which the leather was to be subsequently glued, but that strips of canvas merely had been placed along and over the seams.

The sole question presented for determination, as we view the record, is whether these instructions were in fact given to Frank & Co.

The manager of this concern testified in so many words that he carried out the instructions as given in covering the doors, and that he was not directed to cover them with cloth or canvas before placing thereon the leather. It further appears from the evidence that after it was learned that the work under the first contract was not satisfactory, there was a dispute among the parties concerned on the question of responsibility, with the result that Frank & Co. agreed to

do the work over in the method now found to be necessary, and for about one-half of the original contract price, one-third of which the architect was willing to pay, he thinking, as stated by him in a letter to the defendant, that perhaps they were all a little to blame for the unsatisfactory character of the first work upon the doors, and being anxious to have the job completed as early as possible. In the letter he wrote as follows: "I will pay one-third of that amount, the remainder being made up by you or your subcontractor. If, however, you had originally a guaranty from your subcontractor, he should pay for the whole cost himself without involving either you or me. . . . Owing to a variety of causes, especially the difficulty of getting satisfactory information regarding this class of work, too long a time has already elapsed, and it is consequently doubly important that the execution of the work should be completed at the earliest possible moment."

The judgment and order are affirmed.

[Civ. No. 1710. First Appellate District.—January 28, 1916.]

WILLIAM KOEHLER, Appellant, v. D. FERRARI & COMPANY et al., Respondents.

DEFAULT—ORDER SETTING ASIDE—WHEN JUSTIFIABLE.—An oral stipulation granting time to plead to plaintiff's complaint made with the plaintiff instead of his attorney is not binding; but reliance upon it is merely inadvertence and excusable neglect, upon a showing of which the court is justified in setting aside a default.

APPEAL from an order of the Superior Court of the City and County of San Francisco setting aside a default judgment. Bernard J. Flood, Judge.

The facts are stated in the opinion of the court.

Warner Temple, for Appellant.

Devoto, Richardson & Devoto, for Respondent.

THE COURT.—This is an appeal from an order setting aside a judgment taken by default.

According to the showing made by the defendants, their attorney at that time, desiring further time within which to plead to the plaintiff's complaint, and failing, after several attempts, to find plaintiff's attorney at his office, obtained from the plaintiff himself a verbal stipulation extending the time to answer to said complaint five days. Before the expiration of that time the default of the defendant had been taken. Immediately thereafter he moved to set aside the default, and the court granted the motion.

The stipulation being oral—besides having been given by the plaintiff himself instead of by his attorney—was doubtless without force and not binding; but in relying upon it, as they certainly did, the defendants, it seems to us, committed no more than an act of inadvertence and excusable neglect, upon a showing of which the court was fully justified in setting aside the default. To hold otherwise would be to deprive the defendants of the very remedy that section 473 of the Code of Civil Procedure was intended to provide.

Order affirmed.

[Civ. No. 1557. First Appellate District.—January 28, 1916.]

**JACOB ALEXANDER et al., Copartners, Appellants, v.
CHARLES STONE et al., Copartners, Respondents.**

SALE—WHEN NOT BY SAMPLE.—Where an order for goods was given after an examination or an opportunity to examine, and the purchaser then and there paid part of the purchase price and an arrangement was entered into between him and the seller fixing a time for the payment of the balance and the shipment of the goods, it cannot be held that the sale was by sample, although the sellers, at the request of the purchaser, sent samples of the goods to the firm of the purchaser, this being apparently done in order that the latter might solicit orders from the customers of suits and cloaks to be cut up from the cloth from which the samples were taken when the cloth should arrive.

ID.—OPPORTUNITY TO EXAMINE GOODS—IMPLIED WARRANTY.—Where the purchaser had an opportunity to examine the goods in such a case, there was no implied warranty as to the quality, even if the repre-

sentative of the buyers failed to take advantage of the opportunity for examination given him.

ID.—EXPRESS WARRANTY.—Where both buyer and seller of goods, by reason of their occupation, have expert knowledge of the kinds of goods in question, an expression of the latter at the time of the sale that the goods are first class is but the expression of an opinion, or what is termed "puffing," and not an express warranty of quality.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. J. Trabucco, Judge presiding.

The facts are stated in the opinion of the court.

Henry A. Jacobs, for Appellants.

James W. Cochrane, for Respondents.

THE COURT.—This is an appeal by plaintiffs from a judgment in favor of defendants on their cross-complaint.

In the early part of the year 1911 Max Lewis, one of the members of the defendant concern, went from San Francisco to Chicago and purchased from the plaintiffs 21 bolts of certain varieties of woolen goods, and agreed upon the terms of the sale.

The evidence in the case does not sustain the finding of the court that the sale was by sample. The order for the goods was given by Lewis after an examination or an opportunity to examine them, and Lewis then and there paid part of the purchase price, and an arrangement was entered into between him and the plaintiffs fixing the times of payment of the balance, and of the shipment of the goods. True, the plaintiffs at the request of Lewis sent samples of the goods to the defendants in San Francisco, but apparently those were sent in order that the latter might solicit orders from their customers for suits and cloaks, to be made up from the cloth from which the samples were taken when the cloth should arrive. It is plain that they were not sent to enable the defendants to make purchases by sample, for, as just stated, the purchase had already been made and completed.

The authorities sustain this position. (35 Cyc. 223; Civ. Code, sec. 1766; 15 Am. & Eng. Ency. of Law, 1218, 1221.) The defendants, through their representative, as the evidence

clearly shows, having had an opportunity to examine the goods, there was no implied warranty as to the quality, even if the representative of the buyers failed to take advantage of the opportunity for examination given him. (15 Am. & Eng. Ency. of Law, 1218, 1221; Civ. Code, sec. 1771.)

Nor can the judgment be sustained upon the theory that there was an express warranty as to the character of the goods. Plaintiffs introduced evidence tending to show that they were first class, and defendants presented evidence tending to contradict this, and this evidence is the nearest approach to anything in the record upon which it can be contended that the plaintiffs at the time of the sale represented the goods to be first class. Assuming, for the sake of argument, that this may be considered as some evidence to that effect, still it could not be held to amount to an express warranty. It amounts to no more than what is termed "puffing," or an expression of opinion or judgment. Both parties, by reason of their occupation, had expert knowledge of the kinds of cloth in question, and the expression by the plaintiffs at the time of the sale—if we can assume it was made—must be considered a mere relative term and not a representation of a fact upon which the defendants relied—in which event only could it be considered an express warranty as to quality. (35 Cyc. 381, 383.)

There was no claim, nor was the case tried on the theory, that the samples sent to the defendants were not taken from the goods shipped, or that there was a substitution of the goods shipped for those inspected and purchased; and it is also a significant fact in the case that without inspection the defendants refused to accept the first shipment of goods, which were sent by express, payable cash on delivery, and did not repudiate the entire sale until later, when they received and examined a shipment of goods by freight.

The judgment is reversed.

[Civ. No. 1636. First Appellate District.—January 23, 1916.]

E. W. LICK, Respondent, v. CHARLES W. ANDERSON et al., Defendants; MARIA OHLSEN, Appellant.

DEED—CONVEYANCE TO HUSBAND AND WIFE—TENANTS IN COMMON—ASSUMPTION OF MORTGAGE—PERSONAL LIABILITY.—The insertion of the names of a husband and wife as grantees in a deed creates the relation of tenants in common between them, and where the grantees accept such a deed containing a provision that the deed is subject to a deed of trust and also a mortgage which the grantees agree to pay, the latter become personally liable for the amount of the obligations which the encumbrances secure, after such security is properly exhausted, even though the signature of the grantees is not appended to the deed.

ID. — LIABILITY OF WIFE — SUFFICIENCY OF EVIDENCE. — In such a case, where there was substantial evidence, in addition to that furnished upon the face of the deed and the fact that the wife several months after the execution and delivery of the deed to her husband joined in a conveyance of the property and of the title insurance policy, to the effect that she was made aware of the fact and contents of the deed, at or about the time of the transaction, and the title of the property was permitted to remain in their names as tenants in common for several months with such knowledge and without any objection on her part, the evidence is sufficient to sustain a finding that the transaction was not one in which the husband was dealing with his separate property, but that the property received by himself and his wife was community property, and that the latter was consulted and advised as to the same.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Adolphus E. Graupner, Judge.

The facts are stated in the opinion of the court.

Edwin H. Williams, and Harry Gaballe, for Appellant.

Robert B. Gaylord, for Respondent.

THE COURT.—This is an appeal from a judgment in plaintiff's favor, the only appellant being the defendant Maria Ohlsen.

The following are substantially the facts of the case: In the month of February, 1911, Charles W. Anderson and his wife

were the owners of a certain lot in San Francisco, upon which there was outstanding a mortgage for the sum of one thousand eight hundred dollars. During that month the Andersons executed a trust deed to E. W. Lick, the plaintiff and respondent therein, to secure their promissory note for the sum of seven hundred dollars, with interest. On April 1, 1911, they conveyed the property to Henry J. Ohlsen and Maria Ohlsen by a deed which contained the following provision: "Subject to a deed of trust for \$700, dated February 23, 1911; also a certain mortgage of \$1,800, dated February 23, 1911, which the grantees herein hereby agree and assume to pay." This deed was recorded on May 9, 1911. In October, 1911, the Ohlsens conveyed the property to Clara B. Lucier by a deed which recited that the property was subject to the two foregoing encumbrances. At the time of executing this deed Maria Ohlsen also executed an assignment of the title insurance policy to Clara B. Lucier. In the year 1913 the plaintiff herein, his note not having been paid, proceeded to sell the property under his trust deed, but only received at such sale the sum of \$50 to be applied upon his note because of the prior encumbrances. He thereupon commenced this action against the Ohlsens to recover the balance claimed by him to be due after his security had been thus exhausted, relying upon the above-quoted provision in the deed from the Andersons to the Ohlsens. It was the contention of Maria Ohlsen upon the trial that she was not liable upon this stipulation in the Anderson deed, for the reason that the transaction was one entirely conducted by her husband; that the insertion of her name in the deed was a mere formality in which she had no part and of which she had no notice and from which she received no benefit; and that having neither signed nor received the deed containing this stipulation, nor in any way ratified or assented to the above insertion therein, no relation existed between herself and the plaintiff out of which this obligation could arise; and this is her only contention upon this appeal.

It is conceded that upon the face of the instrument upon which the respondent relies for his recovery herein the relation of tenants in common was created by the insertion of their names as grantees in the Anderson deed; and it may not be disputed that if a grantee accepts a deed containing such a provision as is above set forth, such a grantee becomes thereby

personally liable for the amount of the obligation which the encumbrance secures after such security is properly exhausted, even though the signature of such grantee is not appended to the deed. (*Tulare Co. Bank v. Madden*, 109 Cal. 312, [41 Pac. 1092]; *Daniels v. Johnson*, 129 Cal. 415, [79 Am. St. Rep. 123, 61 Pac. 1107].)

Upon the trial of this cause the findings of the court were against the foregoing contentions of the appellant, and were to the effect that the transaction by which the Andersons conveyed the lot to the Ohlsens was not one in which Henry J. Ohlsen was dealing in his separate property, but that the property received by himself and his wife was community property, and that the said Maria Ohlsen was consulted in the matter of such transaction and was advised as to the same.

The appellant insists that this finding of the court is not supported by any other evidence than that furnished by the face of the deed itself, and by the fact that several months after its execution and delivery to her husband she joined in the conveyance of the property and of the title insurance policy upon it to Clara B. Lucier. It may be conceded that under the authorities cited by appellant these facts alone might not have justified the finding and judgment of the trial court; but an inspection of the record discloses that notwithstanding the denials of the appellant, there is some substantial evidence that she was made aware of the fact and contents of the deed from the Andersons to her husband and herself at or about the time of the transaction, and that the title to the property was permitted to remain in her husband and herself as the tenants in common thereof for several months thereafter with such knowledge and without any objection on her part. The testimony of the appellant herself is, to say the least of it, equivocal with regard to these matters; and reading the record as a whole, we are unable to say that the findings of the court are unsupported by the evidence and actions of the parties before it. (*Volquards v. Myers*, 23 Cal. App. 500, 504, [138 Pac. 963].) This being so, we will not disturb the findings and judgment of the trial court.

Judgment affirmed.

[Civ. No. 1717. First Appellate District.—January 28, 1916.]

J. T. JOHNS, Respondent, v. S. D. SANFILIPPO, Appellant.

CONTRACT—EMPLOYMENT TO PICK FRUIT—DISCHARGE OF EMPLOYEES—

REMEDY.—In an action by an employee to recover for breach of an agreement by his employer in which the former was employed to pick fruit, where the court found upon sufficient evidence that the employee was discharged by the defendant and prevented from completing his contract without sufficient cause, the former was entitled to sue for the agreed price of the fruit actually cared for according to the terms of the contract, and was not compelled to sue in *quantum meruit* for the reasonable value of the services performed.

ID.—FINDINGS—INCONSISTENCY OF—LACK OF INJURY.—In such a case a finding that the plaintiff's assignors "neglected to furnish a sufficient number of pickers and cutters to pick, harvest, and cut said grapes, and neglected to pick said fruit as directed by defendant," if inconsistent with the finding that the defendant was not damaged by this neglect in any sum whatever, does not injure the defendant, where the evidence is fairly in conflict as to any injury which the defendant sustained by reason of said neglect, the conflict having been resolved in favor of the plaintiff, and for that reason not to be disturbed on appeal.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Beggs & McComish, for Appellant.

Maurice J. Rankin, and Hermann J. Shirley, for Respondent.

THE COURT.—This is an appeal by the defendant from a judgment in plaintiff's favor and from an order denying a new trial.

The action was brought to recover damages for the alleged breach by the defendant of an agreement in writing between the plaintiff's assignors and the defendant, by the terms of which the former were to pick, cut, and spread upon trays for drying the apricot crop of the latter for the season of 1914, and for the agreed price of \$8 per green ton. The plaintiff alleges that after about a week spent in the work of picking

and preparing for drying of the crop, the assignors were, without cause, discharged by the defendant, and prevented from completing their contract, and he therefore sues on their behalf for the balance due for so much of the crop as they had gathered prior to their discharge at the agreed price therefor per ton. The defendant in his answer denied the allegations of the plaintiff's complaint relative to the discharge, and also pleaded a counterclaim for the alleged loss he had sustained by reason of the insufficient manner in which the plaintiff's assignors had essayed to perform their contract, and by reason of their abandonment thereof before its completion.

The court found that the undisputed facts averred in the complaint as to the terms of the contract and entry upon its performance were true, and then proceeded to find that "On July 25, 1914, said defendant discharged said J. T. Johns and N. T. Johns from said employment and ejected them from the premises on which said crop of fruit was situated, and prevented them or either of them from the picking, cutting and spreading on trays of said crop of apricots, and refused to pay them for the work already done, and refused to comply with the terms of said agreement."

The appellant assails this finding as unsupported by the evidence; but upon a careful reading of the record we think that there is some substantial evidence going to show that while the plaintiff's assignors, after a little more than a week spent in the harvesting of the crop in question, were dissatisfied at the defendant's slowness of payment, and were rather disposed not to go on with the contract, the defendant quickly took advantage of this frame of mind on their part to take the direction of their pickers out of their hands and order them off the premises, and that therefrom the court was justified in making the finding complained of.

The chief contention of the appellant upon the oral argument of the cause was that the plaintiff had mistaken his remedy in bringing an action to recover upon the contract the agreed price of the portion of the crop actually harvested thereunder, and that his appropriate form of action should have been one in *quantum meruit* for the reasonable value of the services performed. This claim of the appellant is predicated upon the theory that the facts show that the contract was terminated either through the fault of the plaintiff's as-

signors, or by the mutual consent of the parties, and could not therefore be made the basis of a recovery founded upon its breach. The difficulty with this contention is that the findings of the court (which, as we have concluded, the proof sufficiently sustained) show that the plaintiff's assignors were discharged by the defendant and prevented from completing their contract without sufficient cause, in which case the authorities sustain the respondent's contention that he was entitled to sue for the agreed price of the fruit actually cared for according to the terms of the contract. (*Cox v. McLaughlin*, 54 Cal. 605; *Alderson v. Houston*, 154 Cal. 1, 10, [96 Pac. 884].)

The appellant further contends that the findings of the court are inconsistent, particularly upon the matters set forth in his counterclaim, the alleged inconsistency arising out of the fact that while the court finds that the plaintiff's assignors "neglected to furnish a sufficient number of pickers and cutters to pick, harvest, and cut said crop, and neglected to pick said fruit as directed by the defendant," the court also finds that the defendant was not damaged by this neglect in any sum whatever. Conceding that there may be some inconsistency in these findings, we are unable to see how the defendant is particularly injured thereby, for the evidence is fairly in conflict as to any injury which the defendant sustained by reason of said neglect; and this conflict having been resolved in favor of the plaintiff, we cannot disturb the finding of the court thereon.

No other errors being complained of, the judgment and order are affirmed.

[Civ. No. 1731. First Appellate District.—January 23, 1916.]

LUIS RIVERA, Appellant, v. JOSEPH CAPPA,
Respondent.

PROMISSORY NOTE—WANT OF CONSIDERATION—PLEADING.—The defense of want of consideration for the execution of a promissory note or other instrument is new matter, which must be specially pleaded; but where the answer says in so many words that the note sued on was executed without any consideration whatever, it states a good defense.

ID.—DURESS—WANT OF CONSIDERATION—SUFFICIENCY OF PLEADING.—

A general allegation of want of consideration in the answer, taken in connection with an averment that the note was executed and delivered to the payee as a result of duress, sufficiently pleads a defense, in the absence of a special demurrer.

ID.—APPEAL—WAIVER OF OBJECTION.—In such a case, even if an allegation of want of consideration be considered as a conclusion of law, the objection made after the trial of the case upon the merits will not be considered upon an appeal supported only by a record which does not show that such an objection was interposed by demurrer or otherwise in the court below.

APPEAL from a judgment of the Superior Court of Santa Clara County. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Devoto, Richardson & Devoto, for Appellant.

E. M. Rea, for Respondent.

THE COURT.—This is an appeal upon the judgment-roll alone from a judgment rendered in favor of the defendant in an action upon a promissory note.

The defendant admitted the execution of the note, but pleaded in his answer that "there was no consideration of any kind or nature therefor, . . ." and that at the time of signing said note the defendant was "laboring under great mental excitement, and that the payee therein threatened to blackmail the defendant if he did not sign the same, and that he signed the same through fear of blackmail and by reason of said fear and not otherwise."

The case was tried and determined upon the issues purporting to have been raised by the pleadings of the respective parties, and upon the issues thus raised the trial court found as a fact that the payee of the note "did not at the time of the signing of said note or at any other time part with anything of value for the execution thereof, and that the said note or contract is and was without consideration of any kind or nature."

The defense of want of consideration for the execution of a promissory note or other written instrument is new matter, which must be specially pleaded, and it seems to be the rule in this state that a general averment that the note or contract

sued on was executed without any consideration whatever is but an allegation of a conclusion of law. (*Happe v. Stout*, 2 Cal. 460; *Gushee v. Leavitt*, 5 Cal. 160, [63 Am. Dec. 116]; *Winters v. Rush*, 34 Cal. 136. See, also, 9 Cyc. 738.) But however that may be, it will be noted that the answer of the defendant in the present case averred, in addition to the general allegation of want of consideration, that the note in suit was executed and delivered to the payee as the result of duress. That was an allegation of fact which, when considered in connection with the general averment of want of consideration, and in the absence of a special demurrer, sufficiently pleaded the defense relied upon. (*Shain v. Belvin*, 79 Cal. 262, [21 Pac. 747].) But even if it be conceded that the defendant's answer rested the defense of want of consideration upon the allegation of a conclusion of law, nevertheless the objection made after trial of the case upon the merits will not be considered upon an appeal supported only by a record which does not show that such objection was interposed by demurrer or otherwise in the court below. (*King v. Davis*, 34 Cal. 101, 106; *Illinois etc. Bank v. Pacific Ry. Co.*, 115 Cal. 285, [47 Pac. 60]; *Murdock v. Clarke*, 90 Cal. 427, [27 Pac. 275]; *Sukeforth v. Lord*, 87 Cal. 399, [25 Pac. 497].) In the absence of a record showing the evidence introduced upon the trial, the presumption prevails that there was sufficient evidence to support the finding of the trial court upon the issue of want of consideration; that finding in turn supports the judgment, and therefore the failure of the court to find upon other issues purporting to have been raised by the answer is of no consequence, and need not be considered here.

The judgment appealed from is affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on February 25, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 27, 1916, and the following opinion then rendered thereon by the supreme court.

SHAW, J.—The petition for a rehearing is denied.

The opinion of the district court of appeal states that "it seems to be the rule in this state that a general averment that

the note or contract sued on was executed without any consideration whatever," does not state a good defense, because an averment in that form states a mere conclusion of law.

The only one of the cases cited upon this proposition which appears to support it is *Gushee v. Leavitt*, 5 Cal. 160, [63 Am. Dec. 116]. The court in that case was unfortunate in its mode of expression. In view of the well-established rule that an answer which avers, in so many words, that the note sued on was executed without any consideration whatever, states a good defense (9 Cyc. 738), it is hardly to be supposed that the court there intended to decide the contrary. The context shows, however, that what the court really intended to declare was the equally well-established rule that general allegations that the note was obtained by fraud are not sufficient, but that the facts constituting the fraud must be set forth.

Sloss, J., Lawlor, J., Melvin, J., and Angellotti, C. J., concurred.

[Civ. No. 1652. First Appellate District.—January 28, 1916.]

MARIA E. MARTIN, Appellant, v. UNITED STATES FIDELITY & GUARANTY COMPANY, Respondent.

CLAIM AND DELIVERY—JUDGMENT FOR RETURN OF PROPERTY—TENDER—UNJUSTIFIED REFUSAL TO ACCEPT.—In an action in claim and delivery to recover possession of an automobile, where judgment was rendered in favor of the defendant for the recovery of the property, or the amount found to be its value if return could not be had, the defendant was not justified in refusing to accept a return of the property four months after the entry of judgment, upon the sole ground of its depreciation in value merely by lapse of time, and under the circumstances she cannot maintain an action to recover the value of the automobile upon an undertaking given in the original action to procure delivery of the property to the plaintiff therein.

APPEAL from a judgment of the Superior Court of Alameda County. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

John C. Scott, for Appellant.

Thomas, Beedy & Lanagan, for Respondent.

THE COURT.—This is an appeal from a judgment in favor of the defendant in an action commenced by the plaintiff to recover a judgment against the defendant for the sum of one thousand five hundred dollars, alleged to be due upon an undertaking for the seizure of an automobile in an action for replevin. The case comes before us upon an agreed statement of facts, from which it appears in brief that on or about April 13, 1913, Flora A. Graham and William H. Graham commenced an action in replevin against E. H. Wilson, Eula W. Wilson, and several fictitious defendants for the recovery of the possession of a certain automobile, which at the time of the commencement of said action and for some time previous thereto had been in the possession of the plaintiff in this action, who was served as a fictitious defendant and thus brought into the case. The value of said automobile was stated in said complaint to be one thousand five hundred dollars. A replevin bond was thereupon executed by the defendants in this action in the sum of three thousand dollars, which said bond provided “for the return of the said property to the said defendants (in the former action) if return thereof be adjudged, or for the payment to said defendants of such sum which may for any cause be recovered against the said plaintiff not exceeding the sum of \$3,000.” Thereupon the car was taken from the plaintiff in the present action and placed in the possession of the defendant herein. That in said former action a judgment in favor of defendant Maria E. Martin in that action was rendered, by the terms of which it was adjudged that “Maria E. Martin do have and recover from the said plaintiffs and their surety the possession of the said automobile, and that the same be returned to her, and if return cannot be had that she then recover the sum of \$1,500, the value of said property.”

This judgment was rendered and entered on December 24, 1913. On April 9, 1914, the defendant herein tendered to the plaintiff herein the said automobile, which tender the plaintiff herein refused to accept, but, on the contrary, commenced this action to recover from said defendant the sum

of one thousand five hundred dollars, the same being the value thereof as stated in said judgment.

The agreed statement of facts further shows that at the time said automobile was taken from the possession of this plaintiff its value was one thousand five hundred dollars, but that on the said ninth day of April, 1914, when its return was tendered, it was of the value of but one thousand dollars, and that it was on account of this depreciation in the value of the property between the time of its original taking and the time of the tender of its return that the plaintiff herein refused to receive back the said property. It further appears, however, that the said automobile was not used by the defendant herein during the period it was in its possession, and that it had suffered no damage or depreciation by reason of any such use or of any neglect or want of care on the part of said defendant, but that its depreciation in value was due solely to its natural depreciation by age, and that it was the identical automobile which had been replevined which was tendered for return.

Upon the foregoing agreed statement of facts the court rendered its findings and conclusions of law, and gave its judgment in accordance therewith in favor of the defendant.

The sole point urged by the appellant on this appeal is that she was not bound to receive back said automobile from the defendant herein when the same was tendered four months after judgment had been rendered in her favor in the replevin suit, in view of the fact that between the time that said property was originally taken from her and the time of the tender of the return thereof it had suffered a depreciation in value to the extent of five hundred dollars. It is not, however, alleged in the plaintiff's complaint, nor does it in any way appear from the agreed statement of facts, that the said depreciation in the value of said property was due in any way to the delay of four months in making the tender of its return after judgment for its said return had been given; nor does it appear either that the plaintiff suffered any loss from said delay, or that the same was due to any willfulness on the defendant's part, or that it was other than such a lapse of time as frequently occurs between the rendition and the enforcement or compliance with a judgment. In a word, so far as this record discloses, the plaintiff was in precisely the same position at the time the tender of the return of the

property was made as though such tender had been made on the day the judgment in her favor was given. Such being the state of the record, it is clear that the defendant was acting in substantial compliance with the terms of said judgment in tendering the return of the property at the time such tender was made; and this being so, the plaintiff was bound to accept such tender, together with the costs of the former action also then offered in full satisfaction of the terms of her said judgment, and that not having done so, she cannot maintain this action.

Judgment affirmed.

[Civ. No. 1662. First Appellate District.—January 28, 1916.]

UNION TRUST COMPANY OF SAN FRANCISCO,
Respondent, v. W. E. JOURNEY et al., Appellants.

CORPORATION LAW—STOCKHOLDER'S LIABILITY—NATURE OF.—The liability of a stockholder of a corporation for its obligations is, by the terms of section 322 of the Civil Code, a primary and statutory liability, which is in no wise affected by actions against the corporation to recover upon its contractual obligations.

ID.—ACTION AGAINST STOCKHOLDERS—PLEA IN ABATEMENT—PENDENCY OF ACTIONS AGAINST CORPORATION AND AGAINST STOCKHOLDERS ON GUARANTY.—A plea of former actions pending, to be successful, must be based upon actions between the same parties and upon the same cause of action; and such a plea cannot be successfully made in an action against stockholders of a corporation upon their statutory liability, where it is based upon a former action against the corporation itself and an action against some of the stockholders on a guaranty of indebtedness of the corporation executed by them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George E. Crothers, Judge.

The facts are stated in the opinion of the court.

Daniel O'Connell, for Appellant.

Heller, Powers & Ehrman, and James L. Robison, for Respondent.

THE COURT.—This is an appeal from a judgment in plaintiff's favor and from an order denying defendant's motion for a new trial.

The action is one brought upon the alleged statutory liability of the defendants as stockholders of a corporation known as Ensign-Baker Refining Company, upon an alleged indebtedness of said corporation evidenced by a promissory note of the Ensign-Baker Company, executed by its duly authorized officers and delivered to the plaintiff, upon which a balance remained unpaid at the time of the institution of this action amounting to twelve thousand five hundred dollars, with accumulated interest. The only substantial question raised by the defendant's answer and urged upon this appeal is that arising from their plea of another action or actions pending.

The facts upon which this alleged defense to this action and objection to the judgment herein is based are these: On December 15, 1910, the Ensign-Baker Company, a corporation, of which these defendants were then stockholders, borrowed from the plaintiff the sum of twenty thousand dollars, executing a promissory note therefor in said sum. At or prior to this time the plaintiff was the holder of a written instrument constituting a general and continuing guaranty of all indebtedness of the Ensign-Baker Company to it, signed by the defendants W. E. Journeay, E. J. Ensign, L. E. Ensign, F. C. Ensign, and E. C. Dickinson. The particular indebtedness above referred to not having been liquidated, the plaintiff on October 13, 1913, commenced an action against said corporation to recover judgment upon its promissory note evidencing said indebtedness. On October 15, 1913, the said plaintiff also commenced an action against the five above-named persons, who had executed said guaranty to recover judgment upon their liability for said particular indebtedness as guarantors. Each of these actions proceeded to judgment, which was entered in each action in the early part of the year 1914, and in each of which cases an appeal was immediately taken. The present action was begun by plaintiff about two months before the entry of the said judgments in the two preceding actions. None of the defendants herein were parties to the first of said actions begun against said corporation, but five of the nine defendants in the present action were also defendants in the second action which, as we



have seen, was brought to recover judgment upon their general guaranty of the indebtedness of said corporation.

The foregoing statement of the character of these several actions and of the parties thereto will serve to show that there is no merit in the defendants' contention upon the trial of this case and upon this appeal. Neither of the two former suits was an action pending against the same parties or for the same cause of action. These are the distinctive essentials to a successful plea of another action pending. (*Hall v. Susskind*, 109 Cal. 203, [41 Pac. 1012], and cases cited.) This is an action upon the stockholder's liability of each of these defendants which, by the terms of section 322 of the Civil Code as construed in numerous decisions, is made a primary and statutory liability, which is in no wise affected by actions against the corporation of which they are stockholders to recover upon its contractual obligations. And for the same reason and by the same authorities this action would be unaffected by the action brought against some of these defendants upon their contractual liability as general guarantors of the indebtedness of said corporation, in which their relation to it as stockholders is in no wise involved.

It follows that the judgment and order should be affirmed, and it is so ordered.

[Civ. No. 1421. Third Appellate District.—January 31, 1916.]

J. H. PURCELL, Respondent, v. VICTOR POWER & MINING COMPANY (a Corporation), Appellant.

QUIETING TITLE—PORTION OF MINING CLAIM—FORMER JUDGMENT—LACK OF ESTOPPEL—DIFFERENT SUBJECT MATTER.—The plaintiff in an action involving the title and right of possession of two town lots forming a part or portion of a lode mining claim, of which the defendant was the owner, is not estopped by a judgment obtained by the defendant against the plaintiff in a previous action in ejectment to recover the possession of certain specific property situated within the exterior boundaries of the claim, where it appears from the pleadings and from the judgment that such action involved solely the question of the right to the possession of another and different portion or part of the claim.

ID.—ESTOPPEL BY JUDGMENT.—The force of an estoppel by judgment resides in the judgment itself, and not in the finding of the court or the verdict of the jury.

ID.—JUDGMENT—RES ADJUDICATA.—In order that a former judgment may be a bar to future proceedings, it must appear that such judgment necessarily involved the determination of the same fact to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit, but it must appear to have been precisely determined.

ID.—ACQUISITION OF TITLE AFTER ISSUE JOINED—JUDGMENT NOT A BAR. The plaintiff in an action involving the title and right of possession of a fractional portion of a mining claim is not estopped by a former judgment in an action in ejectment involving a different part of the claim, by reason of the fact that the plaintiff did not acquire title to the property in the present action until one year after issue had been joined in the first action, where such fact was not set up by supplemental answer therein.

ID.—EVIDENCE—TITLE UNDER UNRECORDED DEED—CLAIM UNDER SUBSEQUENTLY RECORDED DEEDS — BONA FIDE PURCHASE — BURDEN OF PROOF.—Where one holding under an unrecorded deed brings an action involving the respective titles to the land against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without the knowledge of the rights of the previous grantee.

ID.—RULE WHEN INAPPLICABLE.—Such rule, however, is inapplicable to the plaintiff in an action to quiet title to a portion of a lode mining claim, where the deed under which the defendant relied was not made known until after the plaintiff rested his case.

APPEAL from a judgment of the Superior Court of Shasta County. J. E. Barber, Judge.

The facts are stated in the opinion of the court.

W. P. Johnson, and P. H. Coffman, for Appellant.

Bush & Hall, for Respondent.

HART, J.—The action involves the title and right of possession to certain real estate described as lots 1 and 2 of the town of Harrison Gulch, in Shasta County, said lots being a part or portion of the Bonanza lode mining claim, of which the defendant is the owner.



The amended complaint is in two counts, the first of which, after alleging that "for more than five years last past the plaintiff, by and through his grantors and predecessors in interest, has been the owner of and entitled to the possession of the real property" above referred to, charges that the "defendant, wrongfully and without right, claims to be the owner of the said premises above described adversely to the plaintiff, but that defendant's claim is without right, and that it has no right, title, or interest in or to said premises or any part or portion thereof."

By the second count it is charged that "on or about the 15th day of December, 1909, while plaintiff was the owner of and entitled to the possession of the said premises, the defendant without any right and without the consent of plaintiff and against his will, entered into the possession of the said premises and ousted the plaintiff therefrom, and, ever since said date, has and does now withhold the possession thereof from plaintiff to his damage in the sum of five hundred dollars."

In a supplemental complaint, the plaintiff alleges that, ever since the commencement of this action, he has conducted a saloon business in a building known as the "Weyand Building," in Harrison Gulch; that said building was the property of the defendant; that there is no other building in Harrison Gulch suitable for the saloon business but the "Friedman Building," situated on the property in dispute in said town of Harrison Gulch, "and the said saloon business which plaintiff has heretofore been conducting at a profit of at least \$480.00 per month has been totally destroyed"; that by reason of the facts thus stated "the plaintiff has suffered and is further damaged in the sum of \$5,000.00."

The defendant, by its answer, denies that the plaintiff at any time was the owner or entitled to the possession of the property described in the complaint, and admitted, as the complaint charged, that it claims to be the owner of said property adversely to the rights of the plaintiff, and "denies that its claim is without right, and defendant denies that it has no right, title or interest in or to said premises or any part thereof, and it alleges that it is the owner in fee of the said property."

The defendant also set up a special defense by way of an estoppel. In this connection, the answer alleges that, in an action pending in the superior court of Shasta County at the

time of the commencement of the present action, and in which the defendant and the plaintiff herein were, respectively, plaintiff and defendant, the title to the property involved in this action was, as between the plaintiff and the defendant here, litigated, determined, and adjudicated; that, on the twenty-fifth day of July, 1910 (this action was commenced February 6, 1910), findings were filed and judgment entered in said former action in favor of the plaintiff therein (defendant herein) and against the defendant therein (plaintiff herein); "that the findings of the court in said action were to the effect, and the court thereby decided, that the plaintiff therein was the owner of all the land involved in the present action, and the judgment of the court in said action has now become final; that the subject matter of the present action was involved in the said action; that the plaintiff herein is estopped by the findings and judgment in the said action from maintaining this action."

The court found that the plaintiff was and is the owner and entitled to the possession of the property described in the complaint; that the defendant wrongfully and without right claims to be the owner of said premises adversely to the plaintiff, but that the defendant has no right, title, or interest in or to said premises or any part or portion thereof; that, on the fifteenth day of December, 1909, while the plaintiff was the owner and entitled to the possession of the said premises, the defendant wrongfully and without the consent and against the will of the plaintiff entered into the possession of the said property and ousted the plaintiff therefrom, and has ever since continued to withhold possession thereof from the plaintiff, to his damage in the sum of five hundred dollars.

The court found against the defendant on its plea of estoppel, and further found that the plaintiff had been, by the wrongful acts of the defendant, generally and specially damaged in certain specified amounts. These latter findings will receive more particular notice hereinafter.

In accord with the findings, the decree adjudged: 1. That the plaintiff was the owner of the property in dispute and entitled to the immediate possession thereof; 2. That the defendant has no estate or interest whatever therein; 3. That the defendant and all other persons claiming an interest or estate in said property be forever debarred from asserting any claim thereto or any part thereof or any interest or estate

therein or any part thereof adverse to the plaintiff; 4. That the plaintiff is entitled to and that he have and recover from the defendant damages in the sum of three thousand five hundred dollars, "together with his costs of suit, taxed at \$40.95."

The defendant presents this appeal from the judgment and supports the same by a transcript of the testimony and proceedings taken and had at the trial, prepared in accordance with the provisions of sections 941a and 941b of the Code of Civil Procedure.

The general contention of the defendant is that the findings are without sufficient support from the evidence. We think that, in so far as is concerned the finding of special damages in the sum of three thousand dollars, this contention must be sustained. In view, however, of another trial, we conceive it to be proper to pass upon certain other important propositions involved in the issues.

1. The court was right in finding and deciding that the judgment obtained by the defendant against Purcell, the plaintiff herein, in the action numbered 3839 in the superior court of Shasta County, and entitled, "Victor Power and Mining Company, Plaintiff, v. John H. Purcell, Defendant," did not operate as an estoppel against the maintenance of the present action. Action No. 3839, which was in ejectment, to recover from Purcell possession of certain specific property situated within the exterior boundaries of the Bonanza mining claim, was commenced in the superior court in and for the county of Shasta on the twenty-ninth day of June, 1909. The complaint in said action, after alleging that the plaintiff "is now, and ever since the 5th day of October, 1907, has been the owner in fee and entitled to the possession of all those lands and premises, . . . known as the Bonanza mining claim, lands and premises" (describing the same), charged that Purcell, the plaintiff herein, on the sixth day of October, 1907, without right entered upon and ousted the plaintiff of the possession of *a part* of said mining claim, lands, and premises, and since said date has wrongfully withheld from the plaintiff in said action the possession of the same, and then follows a specific description of a certain lot upon which there are several buildings (a saloon building, known as the Weyand Building, a barn, and an ice-house), and which constituted a part of or were within the boundaries of the lands or prop-

erty known as the "Bonanza Mining Claim" premises. The lot and the buildings so referred to, it is admitted, are not the specific property in dispute in the present action nor any part thereof.

Although the answer filed by Purcell in said action denied that the plaintiff therein (defendant herein) at the times mentioned in the complaint in said action, or at any other time or at all, was the owner of the lands and premises known and described in said complaint as the "Bonanza Mining Claim lands and premises," it is clear that the vital and, indeed, the only live issue tendered by said pleading involved, not the question of the title or the right to the possession of the whole of the lands and property known as the "Bonanza Mining Claim lands and premises," but solely the question of the right to the possession of the particular lot or parcel of land included within the boundaries of the Bonanza claim, and which lot or parcel of land, with its improvements, constituted a part of the town of Harrison Gulch. The judgment does not purport to have adjudicated any other question. The judgment, while describing the property which Purcell was charged by the power company with having wrongful possession of as being a part of the Bonanza claim, does not adjudicate the question of the title to or the right of possession of the whole of said claim. It reads, in part: "Wherefore, by reason of the law and the findings, it is ordered, adjudged and decreed that plaintiff recover from the defendant, John Purcell, the following real property situate in the county of Shasta, state of California, to-wit: That lot and parcel of the Bonanza mining claim, lands and premises, known as the Weyand Building (saloon, barn and ice-house) and lot and situate," etc.

As we have seen, the present action involves the question of the title to or ownership of another and different portion or part of the Bonanza claim. Thus it is to be observed that the two actions not only do not relate to or involve the same *subject matter* or the same *right*, but the issues submitted for decision in the one action were different from those submitted in the other, since in the one the question of the right of possession was the sole issue, while in the other the question of title to or the ownership of the fee was the main issue.

Section 1911 of the Code of Civil Procedure declares: "That only is deemed to have been adjudged in a former judg-

ment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

It is elementary and, indeed, necessarily true that the force of an estoppel by judgment resides in the judgment itself. It is not, in other words, the finding of the court or the verdict of the jury which concludes the parties, but the judgment entered thereon. (See 23 Cyc. 1218, and cases named in the footnote.)

In *Foster v. The Richard Busted*, 100 Mass. 409, [1 Am. Rep. 125], the rule of *res adjudicata* is stated as follows: "To be a bar to future proceedings it must appear that the former judgment necessarily involved *the determination of the same fact* to prove or disprove which it is pleaded or introduced in evidence. *It is not enough that the question was one of the issues in the former suit. It must appear to have been precisely determined.*" (See *Freman v. Marshall*, 137 Cal. 159, [69 Pac. 986]; *Ephraim v. Pacific Bank*, 136 Cal. 646, [69 Pac. 436]; Freeman on Judgments, secs. 251, 253, 256, 257, 260, 261; *Krutsinger v. Brown*, 72 Ind. 468; *Laguna Drain. Dist. v. Charles Martin Co.*, 5 Cal. App. 166, [89 Pac. 993].)

In this case, while, as seen, the ownership of the whole of the Bonanza claim premises was made an issue by the pleadings and the court found that the plaintiff was the owner of all of said claim, yet the single and precise matter submitted for determination and which was adjudicated in the former action was as to the right to the possession of a small part only of the premises included within the boundaries of said claim; and it is obvious that the matter so decided is the only one involved in said action as to which the plea of *res adjudicata* may properly be held to operate.

The complaint in the former action was filed on the twenty-ninth day of June, 1908. The plaintiff in the present action did not, if he ever obtained any at all, acquire title to the property in question in this action until the twenty-seventh day of November, 1909, which was over one year after issue had been joined in action No. 3839. None of the predecessors in interest of the defendant herein was made or joined as a party defendant in the former action.

In the very early case of *Valentine v. Mahoney*, 37 Cal. 389, 396, Mr. Justice Rhodes, speaking for the court, had this to say of a situation strikingly similar to the one here: "The

plaintiff claims that this title accrued after the suit of *Mahoney v. Wilson* [15 Cal. 42] was determined. But it is not necessary to go to that length, *for if he did not hold the title at the time the issue of fact was joined* in that action, or if acquired intermediate that time and the rendition of the judgment, it was not set up by the supplemental answer, and it was unaffected by the judgment, for the very sufficient reason that it was not involved in the action. It is enough for the plaintiff to show that the alleged newly acquired title was not in issue in the action, without showing that it was acquired after the judgment."

It is true that the rule is that "a judgment is conclusive not only as to the subject matter in controversy in the action upon which it is based, but also upon all matters involved in the same *which might have been litigated and decided in the same case.*" (*Crew v. Pratt*, 119 Cal. 139, 149, [51 Pac. 38].) In different words, "the plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." But can it be said that, under the precise issues as tendered by the complaint and which were vital to the case, the fact of the asserted ownership by Purcell of another and entirely different and distinct parcel of land included within the Bonanza claim constituted "a point which properly belonged to the subject of litigation" in the former action? We think not. The former action, as we have shown, was one in ejectment, in which alone was involved the question of the right to the possession, not of the whole of the premises of the Bonanza claim, but of a fractional part thereof; while the present is a suit to quiet title, in which the question of the ownership of the fee in another and different fractional portion of the lands of said claim is involved. There could obviously be no inconsistency in the wrongful withholding from the power company by Purcell of the possession of a certain portion of its lands and the existence in Purcell of an impregnable title to the fee in another portion of the same lands. Had the judgment in the former action passed in favor of Purcell, most certainly he could not thereafter have claimed that the adjudication had established in him anything

more than the right to the possession of the particular premises within the boundaries of the Bonanza claim known as the "Weyand Buildings and lot." He could not have used the judgment as the foundation of a claim to the possession of other portions of the Bonanza lands, and thus, if the defendant's contention here were sound, there would be wanting that mutuality in operation which is one of the essential characteristics of estoppel by judgment. (23 Cyc. 1238.)

2. The next point made by the defendant is that Purcell failed to show, as, under ordinary circumstances, it would be incumbent upon him to do, that he was a purchaser of the property involved herein in good faith and without notice, actual or constructive, of the purported conveyance by one A. L. Fletcher, one of the original locators and subsequent patentees of the Bonanza claim, of his interest in said claim and premises to his wife, Gertrude Irene Fletcher, prior to the conveyance by all three of such locators and patentees of the parcel of land in dispute herein to the plaintiff's grantor, Paul Friedman.

The record shows: That the property in question was, on the tenth day of January, 1901, by a deed of conveyance quit-claimed by W. J. Thurman and Charles McGraw to Paul Friedman. Said deed recited that the premises thereby conveyed, which included a building in which the saloon business had been carried on, were "the same heretofore acquired by Charles McGraw, one of the parties of the first part herein, from J. F. Shelton by a deed bearing date June 7th, 1897," which deed was duly recorded. On the nineteenth day of November, 1901, Andrew L. Fletcher conveyed by deed the lands and premises known as the Bonanza quartz mine to Gertrude Irene Fletcher, the property so conveyed being all of the lands and premises of the Bonanza mining claim. This deed was recorded on the ninth day of August, 1904. On the twenty-fifth day of November, 1901, Thurman and McGraw, above mentioned, executed and delivered to said Paul Friedman a warranty deed to the property in dispute, said deed having been recorded on the tenth day of December, 1901. On the twenty-eighth day of February, 1904, E. P. Sherk, Frank T. Large, and Andrew Fletcher, by deed, conveyed to Paul Friedman the property in controversy, said deed having been recorded on the third day of March, 1904. On the thirteenth day of February, 1909, the general government issued to

E. P. Sherk, Frank T. Large, and Andrew Fletcher (original locators thereof), a patent to the lands and premises of the Bonanza mining claim, which patent included the property here in controversy. This patent was recorded on the twenty-sixth day of February, 1909. By deed dated October 4, 1907, Fletcher, Large, and Sherk conveyed all the land and premises described in the said patent to the defendant in this action, the said instrument of conveyance having been recorded on the eighteenth day of October, 1907. On August 18, 1909, Gertrude Fletcher, wife of Andrew L. Fletcher, conveyed by deed to the defendant herein whatever interest she acquired in the lands and premises of the Bonanza Mining claim by virtue of the deed from her husband, Andrew Fletcher, to her, bearing date November 19, 1901.

It will be observed that the paramount source of the title to the land in dispute was in the general government, directly from which Sherk, Large, and Fletcher obtained title. The deeds from Thurman and McGraw to Paul Friedman, having been made prior to the issuance of the patent by the government to the parties therein named as patentees, are, therefore, without any force so far as is concerned the deraignment of title to the property in question to Purcell.

It will further be observed that the deed from Andrew Fletcher to his wife, Gertrude, conveyed the grantor's one-third interest in the properties of the Bonanza mining claim which, it will be kept in mind, included the parcel of land in dispute. It will also be noted that the last mentioned deed was executed on the nineteenth day of November, 1901, or approximately two years and three months prior to the execution by Sherk, Large, and Fletcher (who, as we have shown, subsequently became the patentees of the government of all the lands of the Bonanza claim) of the deed purporting to convey the parcel of land in question to Paul Friedman, the grantor of the plaintiff. The said deed to Friedman, however (it will be observed), was recorded in the office of the county recorder of Shasta County approximately five months prior to like recordation of the deed to Gertrude Fletcher from Andrew Fletcher.

Friedman's deed to the plaintiff herein was executed and delivered on the twenty-seventh day of November, 1909, at and previous to which time, it will be borne in mind, the deed

from Fletcher to his wife was on record in the recorder's office.

Neither the deed from Andrew Fletcher to his wife nor the deed from Fletcher, Large, and Sherk to the defendant herein reserved or excepted from its operation any of the lands and premises included within the boundaries of the Bonanza claim of the lands patented to Fletcher, Large, and Sherk by the government.

We are familiar with the rule laid down in the cases, notably the case of *Bell v. Pleasant*, 145 Cal. 412, [104 Am. St. Rep. 61, 78 Pac. 957], that "where one holding under an unrecorded deed brings an action involving the respective titles to the land against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without the knowledge of the rights of the previous grantee." (See, also, *Colton v. Seavey*, 22 Cal. 497, 504; *Long v. Dollarhide*, 24 Cal. 218; *Mahoney v. Middleton*, 41 Cal. 41; *Eversdon v. Mayhew*, 65 Cal. 167, [3 Pac. 641]; *Wilhoit v. Lyons*, 98 Cal. 409, [33 Pac. 325]; *Beattie v. Crewdson*, 124 Cal. 577, [57 Pac. 463].)

Under the rule above stated, the burden, under ordinary circumstances, would rest upon the plaintiff to show, if he could, that he received his deed to the disputed parcel of land without knowledge or notice of the pre-existing legal title of Mrs. Fletcher thereto. The deed of the latter, however, was a stranger to the record until after the plaintiff rested his case, it having been introduced in evidence by the defendant as a part, and, indeed, the mainstay, of its defense against the claim of the plaintiff. It then for the first time became necessary for the plaintiff to attempt to overcome the effect of the prior deed of Mrs. Fletcher, and this obviously could be done, if at all, by way of rebuttal only. In other words, the plaintiff could not know, when he filed his complaint, that the defendant would answer, nor that, if it did, it would claim under the deed from Fletcher to his wife. (*Baker v. Baker*, 9 Cal. App. 737, 740, [100 Pac. 892], and authorities therein referred to.) It was therefore the duty of the defendant to prove the deed from Fletcher to his wife, if it intended to rely upon that instrument, and not upon the plaintiff to anticipate it and undertake to overcome its effect in his original case. And meeting this duty, and so put-

ting in its case, the defendant itself brought to light several considerations which give to the transactions concerning the land in dispute, in so far as they involved the dealings of Fletcher and his wife, a decided color of bad faith—so much so, indeed, as to lead to the conclusion that the burden of showing, if it could be done, good faith in said transactions should justly have been cast upon the defendant, to be by it satisfactorily discharged, before the plaintiff should have been required or called upon to make an attempt to show that he took his deed without notice, actual or constructive, of the asserted prior legal right of Mrs. Fletcher to the land in question.

The plain facts of this case are these: That Fletcher is, and was, at the time of the trial of this action, the manager, the vice-president, and a holder of a large block of the stock of the plaintiff; that the conveyance by him of the land in dispute to his wife, while given for a *good* consideration, was not supported by a *valuable* consideration; that the conveyance by him to Friedman of said land after having conveyed it to his wife constituted not only a fraudulent act, but one that is denounced by our law as a crime, punishable as a felony (Pen. Code, sec. 533); that the neglect of Mrs. Fletcher to record her deed within a reasonable time after she received it enabled him to commit said fraud; that the deed from Mrs. Fletcher to the Victor Power Company, according to its face, was supported by a nominal consideration only (the sum of one dollar), and, moreover, was not made until approximately two years and ten months after Fletcher, Sherk, and Large conveyed by deed to said company all their respective interests in all the lands and premises of the Bonanza claim; that the defendant herein took the conveyance from Fletcher, Large, and Sherk, as likewise they took the deed from Mrs. Fletcher, with at least constructive notice of the prior deed from Friedman to the plaintiff.

Besides the foregoing considerations, Fletcher, while upon the witness-stand, admitted the execution and delivery by him and his co-owners of the Bonanza claim lands of the deed conveying to Friedman the parcel of land in dispute, and during the course of his testimony made no claim that said conveyance was not made in good faith and for a valuable consideration. Indeed, his testimony clearly shows that, after the deed to Friedman, neither he and his associates nor the

Victor Power Company ever exercised any acts of ownership over the so-called Friedman property. While he said he *thought* that the defendant was the owner of the property, he admitted that at no time did the company ever collect rent from the tenants thereof, and, in fact, neither he nor the defendant knew upon whose authority tenants occupied the building. It is true that Fletcher, acting for the defendant after the building became vacant, directed one of the employees of the company to take charge of the building, for no other purpose, however, as declared by Fletcher, than to prevent it from catching fire, the danger of which seemed to be probable from the fact that it was often made a place of refuge by stragglers and men in an intoxicated condition. His principal reason for thus exercising surveillance over the property, he said, was to prevent a conflagration or the destruction by fire of other property in the town of Harrison Gulch (of the bulk of which the company was the owner), a result which would likely follow from the burning of the Friedman Building because of its central location in the town.

Now, as to the deed from Fletcher to his wife and the conveyance from Fletcher, Sherk, and Large to the power company, either one or the other of two conclusions necessarily follows therefrom: 1. That the deed from Fletcher to his wife was not understood or intended by them to operate as a *bona fide* transfer of Fletcher's interest in the lands; or, 2. That Fletcher, when joining Sherk and Large in the deed to defendant, said transfer having been executed subsequently to the making of the deed to Mrs. Fletcher, committed a fraud on the power company, and, as in the case of the deed to Friedman, violated the provisions of section 533 of the Penal Code, *supra*. The first stated hypothesis is the more reasonable, perhaps, in view of Fletcher's peculiar position with reference to this action. In this connection, it is to be observed that, while the action here is against the Victor Power Company, a corporation, it is obvious that a judgment in its favor would inure greatly to the benefit of Fletcher, since he was not only manager of, but a large stockholder in, the defendant at the time of the trial of this action. And it may parenthetically well be observed that Fletcher, as such manager and stockholder, if not strictly in a legal aspect, was, nevertheless, most certainly in substantial effect, in this action, in the very unenviable position of one who attempts to bolster up his own

title to property by and upon his own fraudulent act, or, in other words, attempts to establish that his own deed is void because it was made and delivered in fraud of the rights of his prior grantee.

However, as before stated, all the foregoing facts and considerations were brought out by the defendant itself in attempting to support its claim of ownership of the property in controversy, and were, in our opinion, sufficient to indicate the bad faith of the transaction on which the defendant has planted its resistance to the plaintiff's claim of ownership and to call for a satisfactory explanation thereof, if one may be given. In other words, we believe that, in equity and good conscience, it was a duty incumbent upon the defendant to make such an explanation before the plaintiff should have been called upon to show that he had taken his deed without notice of a prior deed which the facts and circumstances brought out by the defendant itself tend strongly to show was not made and given in good faith and for a valuable consideration.

But, as stated, the judgment must be reversed because of the insufficiency of the evidence to support the finding of special damage.

The court found that, by reason of the ouster of and the wrongful detention of the property in controversy from the plaintiff, the latter was damaged in the sum of five hundred dollars. The court further found that the plaintiff, after having been ejected from the Weyand Building by the defendant, was, by reason of the withholding by the defendant of the possession of the Friedman Building, prevented from engaging in the saloon business in Harrison Gulch, there being no other building in said town suitable for such a business; that the saloon business theretofore conducted by the plaintiff had returned him a profit of \$150 per month, and that said business and profits had been totally destroyed by the said wrongful act of the defendant, and that by reason thereof the plaintiff had been further damaged in the sum of five hundred dollars.

As to special damage, the court found as follows:

"That plaintiff from the 15th day of December, 1909, to the time of the commencement of said action, had been continuously engaged in the conducting of the saloon business in that certain building in the town of Harrison Gulch, county

of Shasta, state of California, commonly known as and called the 'Weyand Building.' That during all of said times the said Weyand Building was too small for the proper handling of the said saloon business of the plaintiff. That there is situated on the property described in paragraph I of these Findings, a building known as the 'Friedman Building,' which building was of sufficient size to accommodate the said saloon business of plaintiff. That during said time there was no other building in said town of Harrison Gulch which plaintiff during any of said times was able to secure, or could secure, that was suitable for the transaction of his said saloon business. That by reason of the withholding of the possession of the said Friedman Building from plaintiff, plaintiff has been specially damaged in this, that he was during said time greatly restricted in the volume of business which he otherwise would have been able to do and was and has been deprived of a large revenue which he would have otherwise received if he had been permitted to use and occupy said Friedman Building for saloon purposes during said time, by reason whereof he had been specially damaged in the sum of \$3,000.00."

Although the language of the foregoing finding, "that plaintiff from the fifteenth day of December, 1909, to the time of the commencement of *said action*," etc., is rather ambiguous, still it seems clear enough that the words "the said action" mean the present action, since no other action is previously mentioned in the findings. There is a further ambiguity in the language of the finding in that this action was *commenced* on the first day of February, 1910, while the amended and supplemental complaints were filed on November 4, 1910. The supplemental complaint set up the claim for the special damages found in the quoted finding. If the finding refers to the time at which the action was actually commenced (February 1, 1910), then the special damages allowed by the court covered only the period from December 15, 1909, to February 1, 1910, or a period of forty-seven days. If, as perhaps is true, it referred to the period from the fifteenth day of December, 1909, to the date of the filing of the supplemental complaint, then the damages therein awarded cover a period of a trifle over eleven months.

But, in either case, the damage claimed to have been suffered by the plaintiff in the particular referred to is entirely

too remote and speculative to uphold a finding of special damages on that score in the enormous sum of three thousand dollars. The evidence does not establish a substantial criterion by which special damages by reason of the wrongful withholding of the property from the plaintiff may be approximately estimated. In such cases as this, the plaintiff's right to recover for such a loss as is involved in the finding under consideration depends on his proving with sufficient certainty that the advantages he claims would have resulted had the acts of the defendant complained of by him not been committed.

The award of special damages is founded upon the hypothesis, which is presented by the supplemental complaint, that, inasmuch as the Friedman Building was of larger dimensions or more capacious than the Weyand Building, the volume of the plaintiff's business would have been greatly increased, with a corresponding increase in profits therefrom, had the plaintiff not been wrongfully deprived by the defendant of the possession of the former building and he thus enabled to occupy and use said building for the purposes of the saloon business.

There is no necessity for reviewing at length in this opinion the testimony offered and received in support of that proposition and upon which the trial court predicated the above-quoted finding. Most of whatever proof there is in the record upon this question of special damages came from the testimony of the plaintiff himself. He testified that, during the period of time that the possession of the Friedman Building was withheld from him by the defendant, and while he was still occupying the Weyand Building, and during the last six months of his occupancy of said building, his receipts for sales of liquor amounted to an average of \$48 per day, of which \$18 represented profits. He remained in possession of the Weyand Building until the thirtieth day of October, 1910, or down to four days before his supplemental complaint was filed. Accepting his statement that his net earnings during the period mentioned amounted to \$18 per day, it, of course, follows that his loss, by reason of being deprived of the occupancy and use of the Friedman Building, would be the difference between the amount so earned and any sum in excess of said amount which he might show with sufficient certainty that he would have earned as profits had he, during

that time, occupied and used said building for the purposes of the business in which he was engaged. The record does not disclose that this difference has been ascertained or even approximately so. There is testimony by the plaintiff and another witness testifying in his behalf that the plaintiff's saloon in the Weyand Building was generally crowded for room because of the large number of frequenters thereto, and that the saloon was not of sufficient dimensions to hold the number of card tables necessary to accommodate such of the plaintiff's customers as desired to play at cards for drinks. The plaintiff appears to have regarded the lack of room for additional tables as constituting the principal drawback of the Weyand Building to his business; but it was not shown, nor was there any attempt at showing, how much business was turned in by the card games to the plaintiff, nor is it satisfactorily made to appear that he would have actually sold more liquor had he been able to add to his establishment a sufficient number of card tables to have accommodated all his customers desiring to play at cards. For aught that appears to the contrary from the record, those of his customers having a predilection for card-playing who were deprived of the opportunity of indulging in that pastime because of lack of facilities in that respect might have patronized the plaintiff's bar to an extent equal to that which they would have done had they been engaged in card-playing. At any rate, as before declared, there is no satisfactory showing that the plaintiff suffered the loss of any business by reason of the comparatively restricted dimensions of the Weyand Building. The most that can be said of all the testimony presented by the plaintiff upon this element of special damage is that he did a profit-producing business while he occupied the Weyand Building. Clearly, this is not sufficient warrant for a finding that he would have done a greater amount of business and as a consequence derived larger profits had he been allowed the occupancy and use of the Friedman Building for the purposes of his business.

The judgment is reversed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 439. Second Appellate District.—February 1, 1916.]

THE PEOPLE, Respondent, v. E. D. LOVE, Appellant.

CRIMINAL LAW—COMMISSION OF LASCIVIOUS ACT—EVIDENCE—PROOF OF OFFENSE ALLEGED.—In a prosecution under section 288 of the Penal Code, which makes punishable acts of a lascivious nature "other than the acts constituting other crimes provided for in part two of this code," it cannot be contended that the evidence established a different charge from that alleged in the information, in that the acts described by the prosecuting witness constituted an offense under section 288a of such code, where the latter section was not enacted until after the date of the offense alleged in the information.

ID.—CONSTRUCTION OF CODE—COMMISSION OF OFFENSE—CHILD UNDER FOURTEEN YEARS.—The provision contained in section 288 of the Penal Code that the offense therein described may be committed by "any person," includes a child under the age of fourteen years.

ID.—ACTS OF SODOMY—RELEVANCY OF PROOF.—Proof of prior lascivious acts, even though such proof tends to show the commission of the distinct crime of sodomy, is relevant for the purpose of illustrating the lascivious disposition of the defendant.

ID.—EVIDENCE—KNOWLEDGE OF WRONGFULNESS OF ACTS—EXCLUSION OF TESTIMONY—LACK OF PREJUDICE.—In a prosecution for the commission of lascivious acts with a boy of the age of fourteen years, there is no error in sustaining an objection to a question addressed to the complainant as to whether or not he knew that the acts charged were wrong at the time of their commission, which question was asked for the purpose of showing that if the witness understood their wrongfulness, he became an accomplice, and his testimony required corroboration, in the absence of any outline by defendant's counsel of the purpose of the question, or request for an instruction as to the necessity of corroboration of the testimony of an accomplice, or an instruction calling the jury's attention to the matter as to whether the witness had sufficient understanding of the nature of the act committed to become an accomplice.

ID.—REPUTATION OF WITNESS—EXPRESSION OF OPINION—SUFFICIENCY OF FOUNDATION—DISCRETION.—The question as to whether a sufficient foundation has been laid to warrant a witness in expressing an opinion as to general reputation is a matter especially committed to the judgment of the trial court, and unless that discretion is shown to have been abused there can be no prejudicial error.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

E. L. Johnson, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

JAMES, J.—Defendant was convicted of having accomplished the crime described in section 288 of the Penal Code, by committing certain lascivious acts with a boy with intent as specified in the section referred to. As punishment for the offense the trial judge ordered that he be imprisoned in the state prison for a long term of years. The appeal is from that judgment and from an order denying the motion for a new trial.

The evidence offered in support of the allegations of the information was in the main given by the boy in question, who described in detail very shocking acts alleged to have been committed with him by appellant. Appellant was the keeper of a merchandise store in the city of San Diego and the father of the Mexican boy named in the information was a patron of his store. In the rear of the store appellant had a bedroom for his own use, he appearing to be an unmarried man. It was in this room that the alleged criminal acts are said to have been committed. The father of the boy testified that upon going into the front of the store to make some purchase he failed to find the appellant there, and discovered him in the bedroom lying upon the bed in company with the boy, his body being in contact with that of the boy. He was not able to see what act the two were committing, for appellant immediately arose from the bed and the boy went through a rear door. Upon being questioned by the father, the son told the latter what he and appellant had been doing in the room, and the arrest followed. While on the witness-stand the boy, in addition to describing the acts committed with him, stated that the same kind of acts had been upon prior occasions practiced between the two. There was testimony given by other witnesses that the boy had been seen in and about the store and rooms of the appellant.

It is first claimed that the evidence established a different offense from that alleged in the information, in that the acts described by the boy constituted an offense under section 288a

of the Penal Code, and therefore could not be proved under a charge framed agreeable to the provisions of section 288 of the same code. The section under which appellant was prosecuted makes punishable acts of a lascivious nature "other than the acts constituting other crimes provided for in part two of this code." It is a sufficient answer to this contention, as is properly stated by the attorney-general, that section 288a, referred to by counsel for appellant, was not a law at the time of the commission of the offense alleged. The information and proof made fixed the date of the alleged crime as of the 15th of April, 1915. Section 288a was a new section enacted by the legislature of 1915, which did not become effective until August of that year.

We think there is no merit in the added contention that because section 288 provides that the offense may be committed by "any person," that a child under the age of fourteen is not such a person. The evidence was ample to show the lascivious motives of appellant in causing or persuading the boy to contribute to the commission of the offense. Counsel here suggests another question, which refers to an alleged error committed by the court in ruling upon certain offered testimony. On cross-examination the boy was asked: "Q. At the time that you say that these acts were done, did you know that they were wrong?" This was objected to as "immaterial," and the objection was sustained. Counsel went no further with questions in that direction, and did not outline to the court what theory he was pursuing in calling for testimony as to the fact indicated. He now argues that, as the boy was under the age of fourteen years, he was presumptively incapable of committing a crime unless he knew and appreciated the wrongfulness of the acts. Section 26 of the Penal Code does provide that all persons are capable of committing crimes except: "1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." It is argued that the testimony was material because, if the boy understood the nature of the act and that it was wrong, he became an accomplice with the appellant, and therefore his testimony would require corroboration. The independent testimony introduced, as we have suggested the general substance of it, was corroborative, and probably in this view we would be compelled to say that the error, if

any, did not result in a miscarriage of justice. However, we conceive that in order to make the ruling of the court amount to prejudicial error, counsel should have called attention to his purpose in asking the question which was ruled out. Furthermore, the jury had before it the boy, and had the opportunity of observing the state of his mental development, his ability to understand, and altogether, under the facts and circumstances, it would seem that they were authorized to draw a conclusion from the testimony before the court upon the very matter adverted to. But appellant did not propose a single instruction to the court dealing with the question of the necessity made by the law which requires an accomplice to be corroborated, or any instruction pointing the attention of the jury to the matter as to whether the boy had sufficient understanding of the nature of the act committed as to become an accomplice. Under such a state of the record, we think the contention for error as to that proposition is not well founded.

It is contended next that evidence was introduced tending to show that appellant committed acts of sodomy with the prosecuting witness, which would not be included within the acts described by section 288. The testimony of the boy does very strongly hint that, in addition to other lascivious acts, the crime of sodomy was committed, although it cannot clearly be told that such was the case. This testimony, which was given in response to direct questions, was all answered without objection being made. But at the conclusion of it appellant's counsel said: "We object to that and move to strike out all the prior testimony along that line. I think that is absolutely incompetent under the charge in this case, a separate and distinct matter." The court responded that the objection was sustained. Not only was the ruling in its whole purport favorable to appellant, but the objection to the testimony, in view of the fact that it was brought out by direct questions of the prosecution, was waived. This court has held in *People v. Harrison*, 14 Cal. App. 545, [112 Pac. 733], that, under a charge there considered which was like the one here, proof of prior lascivious acts, even though that proof tends to show the commission of the distinct crime of sodomy, is relevant for the purpose of illustrating the lascivious disposition of the person charged.

We think that the court did not abuse its discretion in refusing to allow the witness Maud Hill to testify as to the



general reputation of the father of the boy for truth, honesty, and integrity. The question as to whether a sufficient foundation has been laid to warrant a witness in expressing such an opinion is a matter especially committed to the judgment of the trial court, and unless that discretion is shown to have been clearly abused, there can be no prejudicial error. Two witnesses were asked by appellant's counsel as to whether they would believe statements of the father of the boy if given under oath, to which questions objections were sustained. This court in the case of *People v. Corey*, 8 Cal. App. 726, [97 Pac. 907], has held that such a question may properly be asked, but we need not here determine, assuming that there might be among the justices of this court a difference of opinion as to that matter, the correctness of that holding, as subsequent to the date of that decision an amendment to the constitution has been made which requires that no reversal shall be ordered unless it appears that by reason of the error alleged a miscarriage of justice has resulted. The appellant was permitted to make proof of his own reputation, and also of the alleged bad reputation of the boy's father, who appeared as a witness against him. It can only be in cases where there has been an undue restriction of this privilege to make proof as to personal character that error of a sufficiently prejudicial character to warrant a new trial can be said to have been committed.

A careful examination of the record makes it clear to us that there was sufficient competent evidence heard to support the verdict of the jury.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 304. Third Appellate District.—February 1, 1916.]

THE PEOPLE, Respondent, v. SALVATORE CAVALLINI,
Appellant.

INTOXICATING LIQUORS—KEEPING PLACE FOR SALE AND DISTRIBUTION—CHARACTER OF TERRITORY—INFORMATION.—An information charging a defendant with the crime of keeping and conducting a place for the sale and distribution of alcoholic liquors in "no-license territory," should contain a direct averment that the territory was of such character, and the date when the ordinance so declaring became effective should be stated or proven.

ID.—EVIDENCE—KEEPING OF PLACE PRIOR TO DATE ALLEGED—PREJUDICIAL ERROR.—In a prosecution for the crime of keeping a place for the sale and distribution of alcoholic liquors in "no-license territory," where it is neither alleged in the information nor proven at the trial that the territory was "no-license territory" prior to the date alleged in the information, it is reversible error to admit evidence that the defendant prior to such date kept a place of public resort where alcoholic liquors were sold and distributed.

APPEAL from a judgment of the Superior Court of Madera County, and from an order denying a new trial. W. M. Conley, Judge.

The facts are stated in the opinion of the court.

L. J. Schino, M. H. Edwards, H. Brickley, and H. K. Landram, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—This case was determined October 29, 1915, and opinion filed on that day. (21 Cal. App. Dec. 583.) A rehearing was ordered particularly upon two points: First. Is the information sufficient to show that the fourth supervisor district of Madera County was no-license territory? Second. Was evidence tending to show that defendant kept and conducted a place where alcoholic liquors were sold on days prior to September 30, 1914, admissible?

Defendant was convicted and sentenced to pay a fine of six hundred dollars and to be imprisoned in the county jail

for the period of seven months. He appeals from the judgment and the order denying his motion for a new trial.

The information reads as follows: "Salvatore Cavallini is accused by the district attorney for the county of Madera, state of California, by this information, of the crime of keeping and conducting a place where alcoholic liquors are kept for the purpose of sale and distribution in 'no-license territory,' committed as follows: The said Salvatore Cavallini on or about the 30th day of September, nineteen hundred and fourteen at and in the said county of Madera, and state of California, and prior to the filing of this information did willfully and unlawfully keep a place of public resort in the fourth supervisor district of Madera County and did keep in said place of public resort for the purpose of sale and distribution in said 'no-license territory,' alcoholic liquors, to wit: beer, whisky, wine and ferment, contrary to the form, force and effect of the statute," etc.

In our former opinion we stated that there should have been a direct averment of the fact that the district mentioned was "no-license territory," and we may here add that the date when the ordinance so declaring took effect should have been stated or should have been proven. We were, however, influenced in our decision upon the demurrer and also as to the admissibility of certain evidence by a stipulation made at the opening of the trial which we assumed was in effect an admission that the district was "no-license territory" by force of an ordinance passed prior to September 30, 1914, and covering the period to which evidence would relate. It seemed to us that as the attack made on the information was aimed solely at the omission clearly to allege the existence of an ordinance making the district "no-license territory," this omission might be disregarded where all parties admitted the existence of the ordinance and went to trial pursuant to the stipulation.

It seems, however, that the full record on the subject was overlooked. The question arose in the first instance on the demurrer to the information which was overruled by the court.

In his opening statement to the jury the district attorney, Mr. Murray, addressing himself to defendant's attorney, said: "I suppose, Mr. Schino, you will admit that the fourth supervisor district on the date alleged in the information was 'dry territory'?" Mr. Schino: No, sir; if your Honor please, we

desire to make a formal objection in that respect. If I make that admission I will be bound by it. As quick as the first witness is sworn I desire to interpose an objection covering that proposition, unless your Honor desires me to make the objection at this time. The Court: You may as well make your motion now. Mr. Schino: We will consider it made after the first witness is sworn? The Court: Yes. Mr. Schino: We will object to any testimony being introduced in the case with reference to the fourth supervisor district of Madera County being 'dry territory,' upon the ground that the information does not allege that the fourth supervisor district of Madera County at the time mentioned in the information was in 'no-license territory.' Second: That the information does not allege that any of the enumerated alcoholic liquors contained therein are alcoholic liquors within the meaning of the code, or within the meaning of the local option act under which the defendant is being prosecuted, and upon the same ground as urged at the hearing on the demurrer. The Court: The objection will be overruled. Now, I suppose under the objection you will admit it was 'no-license territory'? Mr. Schino: Yes, we will admit it with the understanding of course, we reserve our objection. The Court: Certainly, that is understood, but he will not have to bring in the records to make the proof? Mr. Schino: Certainly not. The Court: Then, gentlemen of the jury, it is stipulated by and between respective counsel representing the people and the defendant that the fourth supervisor district of Madera County is 'no-license territory.' That will be taken by you as a fact in the case. Mr. Schino: That is on the 30th of September, 1914. The Court: Yes, I have no reference to anything else except as to the date of this information, that is on the 30th of September, 1914, the fourth supervisor district of the county of Madera was in 'no-license territory.' Call your first witness."

The stipulation went no further than an admission that, on September 30, 1914, the district was "no-license territory," and this admission was subject to defendant's objection that evidence showing a violation of the local option law was not admissible, for the reason that the information failed to state a public offense.

Passing for the moment the alleged insufficiency of the information to state a public offense, and assuming that it was

sufficient, the burden was upon the prosecution to show that defendant was guilty as charged on September 30, 1914, for there was no evidence and no admission of the existence of any ordinance declaring the district to be "no-license territory" prior to that date. In our former opinion we held that evidence that defendant kept a place of public resort for the purpose of sale and distribution of alcoholic liquors at times prior to September 30, 1914, was admissible as tending to show the character of the place and purpose of defendant on that day. All this evidence went before the jury under defendant's objection. Upon further reflection, and particularly in view of the fact that it was not shown that the district was no-license territory prior to September 30th, we think the evidence was inadmissible and was prejudicial. It was prejudicial for the reason that it constituted substantially all of the evidence upon the fact. Prior to September 30th defendant was lawfully engaged in the business for which he was prosecuted; he had a local and United States revenue license to sell merchandise including liquors; the stock on hand September 30th was rightfully in his possession, and was purchased some time prior to that day. The evidence was that the officers seized quite a quantity of liquors at his place of business on the mentioned day, but the purpose for which he was then keeping the place and the liquors was left to be determined by the jury from the evidence that he had for some months previously been keeping there a place of public resort at which liquors were sold and distributed.

The case is as if the no-license ordinance had taken effect on September 30th, and defendant was found then to be in possession of a quantity of liquors. The local option law does not forbid the keeping of intoxicating liquors; the offense consists in keeping them for the purpose of sale and distribution in no-license territory. The prosecution sought to establish this purpose and the jury were to infer such purpose from the fact that defendant had at that place for some months previously been conducting the business of selling and distributing liquors. From the doing of a lawful act the jury were to infer an intention to do and the doing of an unlawful act. Such an inference could not, we think, have legitimately been drawn, and certainly would not be sufficient to overcome the presumption of innocence. Because defendant was lawfully

conducting the business complained of on September 29th, and was found on the 30th still in possession of the place and the merchandise, the jury were to infer the commission of the offense charged.

The court instructed the jury that "the mere shipment of alcoholic liquor, if any, to the defendant in no-license territory, is not of itself sufficient to establish guilt in a case of this kind," and "that the mere keeping of alcoholic liquors in 'no-license territory' by defendant at his home, or upon his premises where he resides (his family resided on the same lot where his place of business was situated), is not unlawful in itself, . . . " but it must appear "that it was the intention or purpose of said defendant to sell or distribute such liquors in said no-license territory"; also that, "under the law of this state, it matters not in what quantities alcoholic liquors are kept in a place in no-license territory, by any person, so long as the same are not kept for the purpose of sale and distribution." The court, however, instructed the jury that they were "to consider all the evidence in the case," which, of course, included the evidence of defendant's having for some months prior to September 30th kept a place of public resort for the purpose of selling and distributing alcoholic liquors. If the jury had not been permitted to consider the evidence of prior acts and conduct, and had followed the instructions, the possession alone of the liquors on September 30th could not have been regarded by the jury as evidence of guilt. We do not mean to hold that prior acts and conduct tending to show the character of the place and the purpose of defendant would not have been admissible had the ordinance been in effect at the time to which such evidence related. Introduced not to prove distinct and separate offenses, but as tending to show the purpose of defendant at the time of the alleged offense, we think such acts and conduct would be admissible.

If there had been some substantial evidence that on September 30th defendant was keeping a place of public resort for the purpose of selling and distributing alcoholic liquors, the evidence of which we are now speaking might have been admissible as tending to support the evidence as to what the defendant was doing on the 30th of September. What we hold is that, upon the facts appearing, the verdict was not sus-

tained by evidence alone of prior acts, and evidence of such acts should not have been admitted.

As the judgment must be reversed, we do not find it necessary to consider the sufficiency of the information, as, doubtless, should there be another trial, it will be amended so as to obviate all question.

The judgment and order denying defendant's motion for a new trial are reversed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 30, 1916.

[Crim. No. 340. Third Appellate District.—February 2, 1916.]

THE PEOPLE, Respondent, v. B. F. WOODSON, Appellant.

CRIMINAL LAW—ADULTERY—ESSENTIALS.—In order to warrant a conviction of the offense denounced in section 269b of the Penal Code, cohabitation alone is not sufficient, but there must be an assumption of the conjugal relations, such as sleeping together, occupying the same room or bed at night, having sexual intercourse with each other as though married, and many other relations that are summed up appropriately by the words "cohabiting with."

ID.—PARENTAGE OF CHILD—RELEVANCY OF EVIDENCE.—In a prosecution for such an offense evidence is admissible that the defendant was the father of a child born to his companion in crime while they were living together as husband and wife, where it is shown that the woman was not cohabiting with her husband.

ID.—PARENT AND CHILD—REBUTTAL OF PRESUMPTION OF LEGITIMACY.—The presumption that a child born of a married woman is legitimate may be rebutted by evidence showing that the husband was incompetent, entirely absent, so as to have no intercourse or communication of any kind with the mother, entirely absent at the period during which the child must, in the course of nature, have been begotten, or only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.

ID.—CONDUCT OF DEFENDANT—INTRODUCTION OF COMPANION AS WIFE.—In such a prosecution there is no error in admitting evidence showing defendant's attitude and conduct when he heard his companion introduced as his purported wife.

- ID.—CAUSE OF WIFE LEAVING HOME—EXCLUSION OF PROOF.**—In such a prosecution there is no error in excluding evidence that the companion of the defendant left her home by reason of the brutal treatment of her husband.
- ID.—CHARACTER WITNESS—EXPLANATION OF ANSWER—LACK OF PREJUDICE.**—In such a prosecution there is no error in permitting a witness as to the general reputation of the defendant to supplement his answer with the explanation that he had known the defendant for three or four years, and had seen him often, and in the last two or three years had not seen him.
- ID.—CONDUCT OF PARTIES—STRIKING OUT OF ANSWER—LACK OF PREJUDICE.**—There is no error in striking out the answer of the mother of the woman to the question as to whether she observed any improper conduct on the part of either the defendant or her daughter while visiting them, where such answer was in part not responsive, and the responsive part subsequently given in answer to another question.
- ID.—TIME OF OFFENSE—INSTRUCTION—LACK OF ERROR.**—An instruction to the jury to find the defendant guilty if he lived in cohabitation and adultery "any time from about the month of November, 1912, up to the twenty-seventh day of April, 1915," is not erroneous, notwithstanding the charge in the information that the offense was committed "on or about the twenty-third day of April, 1915."
- ID.—DATE OF OFFENSE—AVERMENT IN INDICTMENT.**—It is unnecessary to charge in the indictment the precise date upon which an offense was committed, or to prove the offense to have been committed on the day charged, except where time is of the essence of the offense.
- ID.—CONVICTION OF DEFENDANT—EVIDENCE TO BE CONSIDERED—INSTRUCTION—ABSENCE OF ERROR.**—An instruction that "if the jury believed to a moral certainty and beyond a reasonable doubt that the said defendant did"—reciting the averments of the information—"then I charge you it will be your duty to bring in a verdict of guilty as charged," is not erroneous, for the reason that it did not confine the jury to the evidence, where the court also instructed the jury that they had no right to go outside of the evidence, but that they must fairly consider all the evidence in the case.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial.
C. W. Norton, Judge.

The facts are stated in the opinion of the court.

W. H. Briggs, and A. H. Carpenter, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—Appellant was convicted of the offense denounced in section 269b of the Penal Code as follows: "If two persons, each being married to another, live together in a state of cohabitation and adultery, each is guilty of a felony, and punishable by imprisonment in the state prison not exceeding five years."

After a careful reading of the entire testimony we are led to say that the evidence is abundantly sufficient to support the verdict. We may accept the rule insisted upon by appellant that, in order to warrant a conviction, "there must be an assumption of the conjugal relations, such as sleeping together, occupying the same room or bed at night, having sexual intercourse with each other as though married, and many other relations that are summed up appropriately by the words 'cohabiting with,' and cohabitation alone is not enough under the code; there must be sexual intercourse between them. Adultery and occasional acts are not enough," then the showing made by the people measures up fully to the requirement. Indeed, the evidence of guilt seems exceptionally strong when we consider the usual difficulty of establishing such a charge. The inculpatory facts and circumstances are marshaled and set out in his brief by the attorney-general, but we do not feel called upon to repeat them here.

Evidence was received that appellant was the father of a child born to his companion in crime while they were living together as husband and wife. The admission of appellant to that effect, evidence that the wife's husband had no opportunity for sexual relations with her within the requisite period, and other circumstances were introduced which could leave little doubt as to the correctness of respondent's claim as to the parentage of the child.

Appellant contends that such evidence was not admissible, and he cites, among other authorities, *Estate of Mills*, 137 Cal. 298, [92 Am. St. Rep. 175, 70 Pac. 91]. But the rule stated therein has application to "the issue of a wife *cohabiting* with her husband." Here the evidence for the people showed that the woman was not *cohabiting* with her husband, but was, during all the time in question, cohabiting with defendant. In the *Mills* case, *supra*, it was said: "The modern rule was stated by Lord Langdale in *Hargrave v. Hargrave*, 9 Beav. 552, [50 Eng. Reprint, 457], as follows: 'A child

born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.' And the same rule is supported by the authorities in this country. (Citing cases.) But the above rule does not allow either of the parents to testify to the fact of nonaccess *during cohabitation*. Nor is the rule inconsistent with the conclusive presumption that a child begotten and born while the husband and wife *are living together as such*, and the husband not impotent, is legitimate."

There was no violation here of the rule so stated. Indeed, the only questions to which an objection might have been made were allowed to pass without challenge, as shown by the examination of the husband as to his sexual relations with his wife. The wife, it may be said, was not examined as a witness at all.

As to the criticism of the opening statement of the district attorney, it is to be observed that appellant wrests a sentence from its context, and, besides, the portion to which an exception was taken was withdrawn from the consideration of the jury, by the instruction of the trial judge.

Appellant claims that it was error for the court to overrule defendant's objections to the following questions asked of the witness Jensen: "Q. How did you introduce your wife [to the lady of the house]? Q. And what did the lady say, if anything, you introduced as Mrs. Woodson?" It is claimed that "what the witness said to the lady of the house, and what she replied to him, was entirely immaterial and hearsay evidence, and did not tend to prove that defendant was guilty of the offense charged, and the same was prejudicial to defendant."

Appellant, however, overlooks the important circumstance that appellant was present, and the evidence was admissible, and no doubt was received for the purpose of showing defend-

ant's attitude and conduct when he heard his purported wife introduced as Mrs. Woodson. The principle is a familiar one, and is set forth in subdivision 3 of section 1870 of the Code of Civil Procedure, and it may be said that the questions were followed by others whereby it was disclosed that appellant made no objection nor explanation when she was introduced or spoken of in his presence as Mrs. Woodson.

The court did not err in refusing to strike out the following testimony of the witness McAllister: "She claimed Mr. Woodson was the father of the child." This was a part of the conversation of the district attorney with the defendant himself. It was necessary to make intelligible the statement of the appellant in response thereto. In fact, it was an inseparable part of the interview, and could no more be laid out of view than any other portion.

The court was correct in sustaining an objection to the question asked of the mother of the purported Mrs. Woodson as to the reason for the latter leaving home. It manifestly called for an opinion. Besides, the woman was not on trial and her motive or intent in leaving home was not at issue. The purpose of the question was to show that she had been mistreated by her husband and for that reason she left him. Even so, it would throw no light upon the consideration as to her subsequently sustaining meretricious relations with appellant.

Appellant complains because the court overruled his objection to a question asked of Senator Stuckenbruck why it was necessary for him to answer a question as to the general reputation of appellant by explaining that he "had known the man for three or four years, had seen him often; then in the last two or three years had not seen him." The witness, like most lawyers when called upon to testify, indulged in some circumlocution, and appeared somewhat reluctant to answer categorically and emphatically. The interrogatory of the district attorney under the circumstances was quite natural. But if it be conceded that he should not have asked the question, it is perfectly plain that no harm was done, as the witness gave a satisfactory explanation of his previous answers and one entirely favorable to appellant.

The mother was asked this question: "Did you, while you were there visiting them at the Madison Street house, observe any improper conduct on the part of either your daughter or

Mr. Woodson?" She answered: "No, sir. Everything was perfect—he is a perfect gentleman; he is a Christian man." The district attorney moved to strike the answer out as not responsive, and the motion was granted by the court. It is clear that the second part of the answer was not responsive, and the error in striking out the first part was cured for the reason that the answer appears to subsequent similar questions asked of the witness.

The remark of the district attorney that he "was expecting just such trick as that to be attempted in this case," made while one of the counsel for appellant was addressing the jury, is too inconsequential to merit serious attention. Moreover, no motion was made that the remark be stricken out or that the jury be instructed to disregard the same. (*People v. Ye Foo*, 4 Cal. App. 730, 743, [89 Pac. 450].)

The information against appellant was filed on June 5, 1915, and it charged him with having lived in cohabitation and adultery "on or about the twenty-third day of April, 1915, and prior to the filing of this information." The court instructed the jury to find him guilty if he lived in such cohabitation and adultery as defined in the instructions, "any time from about the month of November, 1912, up to the twenty-seventh day of April, 1915." The objection to this instruction made by appellant is answered by *People v. Sheldon*, 68 Cal. 434, [9 Pac. 457], and other decisions. In the Sheldon case it is said: "It is unnecessary to charge in the indictment the precise date upon which an offense was committed, or to prove the offense to have been committed on the day charged, except where time is of the essence of the offense." (See, also, *People v. Squires*, 99 Cal. 327, [33 Pac. 1092].)

Appellant complains of the instruction, "If the jury believe to a moral certainty and beyond a reasonable doubt that the said B. F. Woodson did"—reciting the averments of the information—"then I charge you it will be your duty to bring in a verdict of guilty as charged," for the reason that it did not confine the jury to the evidence, but permitted them to derive the belief "from any source irrespective of the evidence." But it is fundamental that the instructions must be considered together to ascertain if the jury could have been misled. Keeping this in mind, it is impossible to conclude that the jury could have so understood the instruction. One

of said instructions was: "You have no right to go outside of the evidence admitted by the court, and you have no right to reject arbitrarily the evidence of any witness. You must fairly consider all of the evidence of the case." Furthermore, "In criminal cases guilt must be established beyond a reasonable doubt and to a moral certainty and the burden of proof is upon the people. The defendant in a criminal case is by law presumed to be innocent until the contrary is satisfactorily proven by competent evidence." They were further instructed that "if you are not satisfied that the prosecution has *proven* both cohabitation and adultery, as defined in these instructions, beyond a reasonable doubt and to a moral certainty, you should find the defendant not guilty."

We have noticed specifically all the objections of appellant, though it must be apparent that most, if not all, of them are quite trivial.

The defendant was fairly tried and justly convicted, and the judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 30, 1916.

[Crim. No. 452. Second Appellate District.—February 2, 1916.]

THE PEOPLE, Respondent, v. ESTAQUIO VILLALOVAS,
Appellant.

CRIMINAL LAW—MURDER—CREDIBILITY OF WITNESS—IMPROBABILITY OF COMMISSION OF CRIME BY DEFENDANT—APPEAL—REVIEW.—Upon appeal from the judgment and order denying a new trial in a prosecution for the crime of murder, it cannot be urged as grounds for reversal that the jury should not have believed the testimony of the chief witness for the prosecution as to an alleged confession made to him by the defendant because of the existence of a feeling of unfriendliness between the witness and the defendant, and the improbability of the commission of the crime by the defendant by reason of his departure and return to the place of the crime, and such questions were for the determination of the jury, and of the trial court upon the motion for a new trial.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

Dorn & Parker, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

SHAW, J.—Defendant was convicted of committing the crime of murder in the second degree, the judgment of the court being a sentence to imprisonment for a term of fifteen years. He appeals from the judgment and from an order denying his motion for a new trial.

The ground upon which defendant's attorneys argue for a reversal is that the evidence is insufficient to justify the verdict.

It appears that Samuel Smith, an old man 87 years of age, lived alone in a shack located upon the waterfront in San Diego; that about 4 o'clock p. m., June 10, 1915, he was discovered in his house with wounds on the back and front of his head which had apparently been inflicted by a blood-stained club found near him. The blood resulting from his wounds was dry, indicating long exposure. It also appeared that defendant, for some three or four nights immediately preceding the attack, had slept at the house of deceased, and that he left the city on the evening of the day when deceased was found in his wounded condition. While other facts and circumstances were established tending to prove defendant's guilt, the chief evidence, as to the competency of which no attack is or was made, was that given by one Isais as to a conversation had with defendant, wherein the latter told him that he had, for the purpose of obtaining money which he knew Smith possessed, attacked him with the club, striking him in a manner calculated to inflict the wounds, which, as shown by other evidence, caused the death of deceased.

The defendant, over plaintiff's objection, in presenting his defense, was permitted to testify that a feeling of unfriendliness existed between him and the witness Isais, by reason of which fact his counsel insist that the jury should not have believed the testimony so given by the latter. It also ap-

peared that after the commission of the crime defendant had been in and out of said city, where he was known, and hence it is argued that had he been guilty, it is improbable that he would have returned to the scene of the crime.

These were proper questions to present to the jury, since they in the first instance were the judges of the credibility of the witnesses, and to the trial court before which such witnesses appeared, in presenting a motion for a new trial; but upon appeal they constitute no sufficient ground for reversal by this court. It may be, as claimed, that had the jury not given credit to the testimony of Isais, it would have rendered a different verdict. So conceding, it was nevertheless the exclusive province of the jury, under the circumstances shown, to determine the weight which they should accord the testimony touching the alleged confession. (*People v. Raich*, 26 Cal. App. 287, [146 Pac. 907].) According to appellant's theory, it believed the testimony, admittedly competent, to be true. The record discloses no error of law which would justify this court in disturbing the verdict, and the judgment based thereon and the order denying defendant's motion for a new trial are affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 440. Second Appellate District.—February 3, 1916].

THE PEOPLE, Respondent, v. JOHN R. MCLEOD,
Appellant.

CRIMINAL LAW—PERJURY—DENIAL OF COLLECTION OF JUDGMENT—JUDGMENT SET ASIDE.—A prosecution for perjury against an attorney based upon a charge that he falsely denied under oath that he collected and received a certain sum of money on account of, and in settlement of, a judgment obtained in an action in favor of his client, cannot be maintained where it appears from the proof that the only judgment rendered in the action was set aside by reason of an error in computation of the amount found to be due.

ID.—UNCERTAINTY IN EVIDENCE—GRANTING NEW TRIAL—DISCRETION OF COURT.—In such a case, where it appeared that the evidence in the action brought by the defendant for his client upon a claim against a third party was indefinite and uncertain as to whether the defend-

ant herein had received anything which he had a right to deem paid to him in settlement of the claim sued upon, there was no abuse of discretion on the part of the trial court herein in making a general order granting a new trial.

ID.—SATISFACTION OF JUDGMENT — DELIVERY IN ESCROW — ESTOPPEL — BURDEN OF PROOF.—In an action brought by the client against the attorney for money had and received, the defendant was not estopped from denying that he received full payment of the judgment because his answer admitted, by not denying, the execution of the satisfaction, where it appears that the satisfaction was placed in escrow and it was not shown that it was filed or even delivered to anyone authorized to file it, except upon conditions not shown to have been performed; and, moreover, the action being for money had and received in a certain sum alleged to have been received by defendant for the use of plaintiff, it devolved upon plaintiff to show that defendant received said sum, or some part thereof, in order to recover judgment.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Appellant.

J. J. Fleming, and Graham & Graham, for Respondent.

SHAW, J.—Defendant was, upon an information filed charging him therewith, convicted of the crime of perjury. He moved for a new trial upon all the statutory grounds and the court, by a general order, granted the motion, from which the people appeal.

It appears from the information that J. M. Brennan and Edith W. Brennan brought suit against defendant to recover a sum of money which they alleged he, as their attorney, had, prior to April 7, 1914, collected from one A. Levin upon a judgment obtained in an action, wherein Edith W. Brennan was plaintiff and said Levin defendant, all of which allegations were denied by defendant in a verified answer filed in said action so brought against him, and that upon trial thereof defendant, as a witness in his own behalf, testified "that prior to the said 7th day of April, 1914, he, the said John R. McLeod, had not received anything on account of said judgment

theretofore entered in said Superior Court in said action No. B-7786, and entitled Edith W. Brennan, Plaintiff, vs. A. Levin, Defendant," which testimony was then and there material to the inquiry then being made; that in truth said testimony so given by defendant was knowingly and willfully false, the fact being that he had, prior to said April 7, 1914, collected and received on account of and in settlement of the said judgment so rendered and entered against A. Levin, credits and sums of money in the aggregate of \$1,575.

As shown by the mixed and muddled up record presented in support of the appeal, the plaintiff, in proof of the facts alleged in the information as constituting the offense, offered what on its face purported to be a judgment rendered on March 16, 1914, and entered March 21, 1914, in favor of plaintiff in the case of *Brennan v. Levin*, for the sum of one thousand five hundred dollars and interest, which, as shown, is followed by what appears to be a minute order, giving title and number of the case, that "it appearing to the court that the judgment herein entered on the 21st day of March, 1914, in Book 295 of Judgments, at page 236, contains an error in the computation of the amount therein found to be due, it is ordered that said judgment be, and the same is vacated and set aside." It thus appears that this, the only judgment rendered in the case of *Brennan v. Levin*, so far as we are able to find in the record, was vacated and set aside; hence defendant could not, as alleged in the information, have collected anything *on account of, or in settlement of*, said judgment, since none existed.

It further appears by vague and uncertain evidence offered on behalf of the people, that in the controversy between Brennan and Levin, wherein defendant acted as attorney for the plaintiff and one Cheroske acted as attorney for the defendant, the attorneys of the respective parties, about March 16th, entered into some indefinite agreement whereby Cheroske was to receive from Levin certain checks and papers evidencing credits to which it was agreed he should be entitled, together with a satisfaction of the purported judgment against Levin executed by defendant, under which arrangement, as to a large part, if not all, of the amount in controversy, a future settlement and payment was contemplated, and when consummated the satisfaction so executed should become operative. The evidence as to this agreement is indefinite, and

of a character which might well leave some doubt in the mind of the court as to whether or not, owing to uncertainty as to the nature of the agreement and uncertainty as to the same being fully executed on April 7th, defendant had as alleged received anything which he had a right to deem paid to him in settlement of Brennan's claim against Levin. However this may be, we are satisfied that there was no abuse of discretion on the part of the trial court in making the general order granting defendant's motion for a new trial.

Notwithstanding the fact, the order is in terms general, the argument of counsel for appellant is addressed to the alleged error of the court in granting the motion upon the ground that, since in his answer defendant admitted, by not denying, the execution of the satisfaction, he was estopped from denying that he had received full payment of the judgment; that whether or not defendant received anything, he was liable for the whole amount of the judgment on account of executing the satisfaction. The satisfaction, however, was placed in escrow, and it does not appear that it was filed or even delivered to anyone authorized to file it, except upon conditions not shown to have been performed. Moreover, as stated, the action was for money had and received in the sum of \$1,575 alleged to have been received by defendant for the use of plaintiffs, and therefore it devolved upon them to show that he had received said sum, or some part thereof, in order to recover judgment. It may be that had the action been one for damages, any evidence to the effect that defendant received money would be immaterial, since the issue involved would be to what extent the plaintiff had been damaged by the act of the defendant in satisfying the judgment.

The order appealed from is affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 459. Second Appellate District.—February 3, 1916.]

THE PEOPLE, Respondent, v. H. L. FREEMAN, Appellant.

CRIMINAL LAW—PASSING CHECK WITHOUT FUNDS—PLEADING AND PROOF

—IMMATERIAL VARIANCE.—In a prosecution for the crime of passing a check without having sufficient funds in the bank upon which it was drawn to pay the amount specified therein, where the check offered in evidence corresponded in all respects with the copy set out in the information, except that the figure "1" appeared in the date line, making the wording "3-12 1915," instead of "3-2 1915," the variance between the pleading and the proof was immaterial and non-prejudicial, where it appeared in the evidence that the omission of the figure "1" before the "2" in the date line was a clerical error, and the evidence identified the check as being that which it was charged the defendant had unlawfully passed.

ID.—VARIANCE—TEST OF MATERIALITY.—The test of the materiality of a variance is whether the indictment so fully and correctly informs the defendant of the criminal act with which he is charged, that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense.

ID.—EVIDENCE—CONDITION OF BANK ACCOUNT—STATEMENT OF BANK—ABSENCE OF ERROR.—In such a case, where the cashier of the bank in which the defendant had an account prior to the date of the transaction in question, was permitted, over the defendant's objection, to testify from a sheet made up from the books of the bank as to the state of the account, and the checks drawn against the credit which the defendant had had at the bank were introduced in evidence, the error, if any, was cured by the introduction of testimony by the defendant in which he admitted the passing of the check in question and that at the time he drew it he had no funds on deposit at the bank but claimed the situation was explained to the complainant.

ID.—INSTRUCTIONS—INTENT.—In such a case there was no error on the part of the court in modifying an instruction offered by the defendant, which advised the jury that the intent of the defendant was "the all-important element," by making it read that the defendant's intent was "an" important element.

ID.—CHECK PAYABLE TO CASH OR BEARER—CONSTRUCTION OF SECTION 476, PENAL CODE.—A check drawn to "cash or bearer" is such an instrument as is described in section 476 of the Penal Code, as it is an order for the payment of money.

APPEAL from a judgment of the Superior Court of Imperial County, and from an order denying a new trial. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

John A. Berry, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

JAMES, J.—Defendant was charged with and convicted of the crime of passing a check without having sufficient funds to his credit in the bank upon which it was drawn to pay the amount specified therein. The check was drawn to “cash or bearer” and was signed by the defendant. The jury returned a verdict of guilty, with a recommendation for probation. The court ignored the recommendation and sentenced defendant to serve a term of three years in prison. He appeals from that judgment and from an order denying his motion for a new trial.

The information charged that the check was passed on or about the twelfth day of March, 1915, and as set out in the information the date line of the check read as follows: “Brawley, Cal. 3-2 1915.” The check when offered in evidence corresponded in all respects with the copy set out in the information, except that the figure “1” appeared in the date line, making the wording “3-12 1915,” instead of “3-2 1915.” To the introduction of the check objection was made on the ground that there was a material variance between the allegations and the evidence offered. The objection was overruled. It is now claimed that the court in making this ruling committed error prejudicial to the rights of the defendant. It may be admitted that there was a variance, and the question presented is as to whether that variance was of such a nature as might permit of the appellant being prosecuted for a separate offense based upon the check as it appeared in its form different from that described in the information. If the variance was of that kind, then it must be said that a miscarriage of justice would result upon this conviction. The question to be answered is, as expressed in the decision in *People v. Terrill*, 132 Cal. 497, [64 Pac. 894], where the court quotes from Underhill on Criminal Evidence: “Does the indictment so far

fully and correctly inform the defendant of the criminal act with which he is charged, that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense?" In *People v. Arras*, 89 Cal. 223, [26 Pac. 766], the court said: "A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense." Considering the variance there presented, the court further declared that: "The discrepancy did not in any respect affect the validity of the information, nor could it in any way have misled or prejudiced the defendants in their defense; it affected none of their substantial rights; the variance was therefore immaterial." Examining the evidence in this case, it seems to have been shown clearly enough that the omission of the figure "1" before the "2" in the date line, was, as stated by the district attorney, a clerical one, and all of the evidence identified the check as being that which it was charged the defendant had unlawfully passed. It was shown that no other check was received from the appellant by the complainant on the date charged, to wit, the twelfth day of March, 1915. As we view the evidence, there could have been no question but that the check offered in evidence was the one by the use of which the crime charged was perpetrated; and we have no doubt at all but that the appellant would not be embarrassed in making proof under a possible subsequent charge made affecting the same check that he had theretofore been convicted of the crime, and hence had been once in jeopardy. It follows, then, that the variance was immaterial.

It appeared that the appellant had, prior to the date of the transaction referred to in the information, a bank account with the banking institution upon which the check described was drawn. The bank cashier, over the objection of appellant, was permitted to testify from a sheet made up from the books of the bank as to the state of the account, and the checks drawn against the credit which appellant had had at the bank were introduced in evidence. All of this testimony was objected to. It would be profitless to discuss the question of the competency of this evidence, in view of the requirement which the law imposes upon us that we shall examine the whole of the evidence to determine whether in a given case

there has been a miscarriage of justice. The defendant could, of course, have rested on the proof offered by the prosecution, but he did not do so, and proceeded to furnish testimony himself, and from this testimony it appears that he admitted the passing of this particular check, and admitted that the time he drew it he had no funds on deposit at the bank, but claimed that the situation was explained to the complainant, and that the complainant understood that there would be funds at the bank to meet the check at a time some few days in the future. Defendant furnished this evidence by his own mouth, and if there was any error committed in the introduction of the bank's statement or checks (it is not determined that there was such error), it was cured by the admissions made of those facts which the evidence objected to was offered to prove. There was evidence showing that, even at the date when defendant claimed that he had promised to have money in the bank to meet the check, the funds were not provided.

Appellant claims that the court erred in modifying an instruction offered by him which advised the jury that the intent of the defendant was "the all-important element." The court changed the language and made the instruction read that the defendant's intent was "an" important element. The modification, we think, was properly made; proof of intent was no more an important requisite than proof of the passing of the check itself. If the intent was an important element, as the court told the jury, it was, as the court properly said in another instruction which is objected to, "a mental process" to be gathered from evidence of words and acts of the party charged. The check described in the information, notwithstanding that it was drawn to "cash or bearer," was such an instrument as is described in section 476 of the Penal Code. That section describes a bill, note, check, "or other instrument in writing for the payment of money." The check issued by appellant was unmistakably an order for the payment of money, drawn by him as such and accepted with that understanding. If there was any defect of proof as to the presentment of the check, as is claimed by appellant, there would be no error in the conviction where it was shown, as appeared by the appellant's own admission, that at the time of the making of the check and thereafter he had no credit at the bank upon which the check was drawn. Upon the whole record, it cannot be said that any right of the defendant in the

conduct of his trial has been so infringed upon as to suggest the conclusion that there has been in this case a miscarriage of justice.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1631. First Appellate District.—February 3, 1916.]

D. C. SAMPLE, Respondent, v. ROUND MOUNTAIN CITRUS FARM COMPANY (a Corporation), Appellant.

NEGLIGENCE—DESTRUCTION OF FEED BY FIRE—SUFFICIENCY OF EVIDENCE.

In an action for damages alleged to have accrued to plaintiff by the destruction of several hundred acres of feed standing upon certain land caused by fire, which it is alleged started upon the lands of the defendant and was negligently permitted to spread to plaintiff's land, where the evidence as to the cause of the fire upon the lands of the plaintiff is in substantial conflict upon the question as to whether it originated from a lighted cigarette dropped upon the lands of the defendant by an employee, or resulted from the burning of grass upon the lands of the defendant for the purpose of clearing the same by a person who claimed to be acting as the agent of the corporation defendant, the findings of the trial court cannot be disturbed on appeal.

ID.—AUTHORITY OF AGENT—SUFFICIENCY OF EVIDENCE.—In such a case, whether a person who acknowledged responsibility for the origin of the fire upon the lands of the corporation defendant was or was not the agent of the defendant was a matter peculiarly within its own knowledge, and the fact that such person was found upon the lands of the defendant at or about the time of the starting of the fire, openly acting in the capacity of superintendent over the defendant's land and the work being done thereon, was a circumstance which carried with it the implication of authority to so act from the corporation defendant, and sufficed to make a *prima facie* showing of the existence of the relation of principal and agent between the corporation defendant and such person, which, in the absence of a showing to the contrary, was sufficient to support a finding of the trial court that such relation did exist at the time of the fire.

ID.—ADMISSIONS OF AGENT—ADMISSIBILITY OF.—In such a case statements of the person who had charge of the defendant's lands at the time of the fire, concerning its origin, and his subsequent offer to settle for the damages resulting therefrom to the plaintiff's lands, were admissible in evidence.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

E. A. Williams, for Appellant.

George Cosgrave, for Respondent.

THE COURT.—In this action the plaintiff sought and recovered a judgment for damages alleged to have accrued to him by the destruction of some 615 acres of feed standing upon his land, as the result of a fire, which it was alleged was purposely started upon the lands of the defendant and negligently permitted to spread to the adjacent lands of the plaintiff. The answer of the corporation defendant admitted that at the time of the fire it was the owner of, and in the possession, use, and occupation of, the land upon which the fire originated. The trial court in effect found that the defendant on August 10, 1914, through its agents, servants, and employees, caused to be set upon its lands a certain fire, which spread to and over the lands of the plaintiff. The sufficiency of the evidence to support this finding is assailed. In this behalf it is contended that the evidence does not show that the fire in question was started by the agent of the defendant; and, conceding for the sake of argument, that the evidence may be found sufficient in this particular, it is insisted that there is no evidence tending to show that when starting the fire such agent was acting within the scope of his employment.

The evidence as to the cause of the fire upon the lands of the plaintiff is in substantial conflict upon the question as to whether it originated from a lighted cigarette dropped upon the lands of the defendant by an employee, or resulted from the burning of grass upon the lands of the defendant for the purpose of clearing the same by a person who claimed to be acting as the agent of the corporation defendant. In the presence of this conflict in the evidence the finding in question must, under the familiar rule, be held to be sufficiently supported by the evidence in so far as it purports to find and fix the cause of the fire; and although the evidence adduced in the case is almost entirely circumstantial, nevertheless it warrants the inference that the person who started the fire

upon the lands of the defendant was the agent of the defendant, and was at the time he started the fire acting within the scope of his employment. Among other things it was shown in evidence that several individuals who were employed upon the lands of the defendant recognized the person who admitted starting the fire as "the boss," and that that person, when approached for information concerning the origin of the fire, admitted that he was responsible for it, and stated that they (evidently meaning the employees under him) were "burning grass and the fire got the best of them."

After the fire had spread to the lands of the plaintiff and destroyed the growing crops thereon, this same person—the boss—came to the home of the plaintiff, and offered to settle for the damage done to the plaintiff's lands by the fire; and when informed by the son of plaintiff that a settlement could not be made without first ascertaining by measurement the extent in acreage of the burned area, said in effect that when such measurement was made he would settle for the damage done to plaintiff, but inasmuch as a corporation was involved, he would before making the settlement have to "make a report to the company."

Whether the person who acknowledged responsibility for the origin of the fire upon the lands of the corporation defendant was or was not the agent of said defendant was a matter peculiarly within its own knowledge; and therefore the fact that such person was found upon the lands of the defendant at or about the time of the starting of the fire openly acting in the capacity of superintendent of defendant's lands and the work being done thereon was a circumstance which carried with it the implication of authority to so act from the corporation defendant, and sufficed to make a *prima facie* showing of the existence of the relation of principal and agent between the corporation defendant and such person, which, in the absence of a showing to the contrary, was sufficient to support the finding of the trial court that such relation did exist at the time of the fire. (1 Labatt on Master and Servant, sec. 22, pp. 69-73; *Elsner v. State*, 30 Tex. 524; *Indiana etc. Ry. Co. v. Adamson*, 114 Ind. 282, [15 N. E. 5]; *Reynolds v. Collins*, 78 Ala. 94.)

If we be correct in the conclusion just stated, it follows that the trial court did not err in permitting in evidence over the objection of the defendant the statements of the person who

was in charge of the defendant's lands at the time of the fire concerning its origin, and his subsequent offer to settle for the damage resulting therefrom to the plaintiff's lands. It is not disputed that if the evidence supports the finding in question it likewise supports the further finding that the fire spread to the lands of the plaintiff as the result of the negligent failure of the defendant's agent to keep it under control.

This disposes of all the points made in support of the appeal, and for the reasons stated the judgment and order denying the defendant a new trial are affirmed.

[Civ. No. 1698. First Appellate District.—February 3, 1916.]

DOMENICO ROSSI, Appellant, v. G. GHIOTTO, Respondent.

DEFAULT JUDGMENT—ORDER SETTING ASIDE—CONFLICTING EVIDENCE—

DISCRETION OF COURT.—On an appeal from an order setting aside a default judgment, where it appears that the order was based upon conflicting evidence, it will not be disturbed, as it was for the trial court to say which showing it would accept as the truth; and where it may be fairly inferred from the showing made by the defendant that his default was induced primarily by the conversations, conduct, and promises of the agent of the plaintiff, it cannot be said that the lower court abused its discretion in making the order complained of.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating a default judgment. E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

Fabian H. Hillebrandt, for Appellant.

O'Gara & De Martini, for Respondent.

THE COURT.—This is an appeal in an action on a promissory note from an order vacating a default judgment entered against the defendant Ghiotto.

The showing made on behalf of said defendant in support of the motion to vacate was to the effect that the defendant.

a foreigner, spoke the English language imperfectly and could not read or write the same; that he was not a maker of the note, but signed the same only as a witness to the signatures of the real makers; that he had never before been a party to a lawsuit; that prior to the commencement of the action he had several consultations with an agent of the plaintiff who had been intrusted with the collection of the note for the purpose of making a settlement; that during those consultations the agent of the plaintiff always evinced a friendly disposition toward the defendant, and expressed a desire to help the latter in his difficulty over the note. Subsequently, on February 2, 1915, the agent of the plaintiff served the summons and a copy of the complaint in the action upon the defendant; that the defendant was unable to read the same, and he did not know and was not otherwise informed that if he failed to answer the same a default would be taken against him; that the agent of the plaintiff told him at that time that before being called upon to pay the note a day for the trial would be set, of which he would be notified, and that upon such trial in the presence of the judge he could make whatever defense he had to the action, and that no step would be taken toward a trial of the action until March 12, 1915; that the defendant had great confidence in the apparent friendship of the agent of the plaintiff and believed implicitly in the statements thus made; that the defendant did not learn that a judgment upon the note had been entered against him until March 9, 1915, whereupon he employed attorneys, who immediately instituted proceedings to set aside the judgment.

The defendant's showing in support of the motion was accompanied by a sufficient affidavit of merits. The plaintiff in reply made no showing that he would suffer any prejudice from the order vacating the judgment or that any injustice would result to him from a trial of the case upon the merits. He did, however, read in evidence upon the hearing of the motion affidavits which tended to contradict all the material averments of the defendant's affidavit; but in the presence of such a conflict in the evidence upon which the motion was heard and determined it is idle to urge upon this court considerations which go only to the weight of the evidence and the credibility of the parties making the respective affidavits. It was for the court below to say which showing it would accept as the truth, and inasmuch as it may be fairly inferred

from the showing made by the defendant that his default was induced primarily by the conversations, conduct, and promises of the agent of the plaintiff, we are not prepared to say that the lower court abused its discretion in making the order complained of. (See *Berri v. Rogero*, 168 Cal. 736, [145 Pac. 95].)

The order appealed from is affirmed.

[Crim. No. 334. Third Appellate District.—February 3, 1916.]

THE PEOPLE, Respondent, v. R. J. WILLIAMS, Appellant.

INTOXICATING LIQUORS—SELLING AND FURNISHING WITHIN NO-LICENSE TERRITORY—INFORMATION—SINGLE OFFENSE.—An information charging a defendant with the crime of selling and furnishing alcoholic liquor within no-license territory is not subject to demurrer on the ground that it states two offenses.

ID.—SALE ON ISLAND IN SACRAMENTO RIVER—CHARACTER OF TERRITORY—CONSTRUCTION OF COUNTY ORDINANCE.—The sale of alcoholic liquors at and on a small tract of land, called Coney Island, lying in the Sacramento River just above the city of Red Bluff, in the county of Tehama, and near the boundary line between the first and third supervisorial districts of such county, which districts are "no-license territory," is a sale within "no-license territory," as the description of the boundary lines of such districts is to be construed so as to make the thread of the main channel of the Sacramento River the dividing line between them.

ID.—COUNTIES—JURISDICTION OVER RIVERS.—Subject to whatever right the United States reserved in the control of the waters of the Sacramento River, for purposes of navigation or other purposes, the state was given the power to partition its territory into counties, including the beds of streams navigable or non-navigable, and was empowered to confer upon such counties the authority to exercise over all such partitioned territory the right to administer its government and to provide for the welfare of its inhabitants.

ID.—CREATION OF SUPERVISORIAL DISTRICTS—TERRITORY INCLUDED—PRESUMPTION.—In construing the intention of the board of supervisors in enacting the ordinance creating the supervisorial districts of the county of Tehama, the then existing conditions must be considered, and it must be assumed that the board intended to include within the boundaries of the several districts all the territory of the county, and not to leave strips of territory lying between any two districts, whether consisting of land, or water, or both, without local government.

ID.—PARTITIONING OF SUPERVISORIAL DISTRICTS — RULE AS TO PRIVATE GRANTS INAPPLICABLE.—The partitioning of the territory of a county into administrative districts is not a grant in the sense that such term is used in section 830 of the Civil Code, which provides that except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, where there is no tide, takes to the edge of the lake or stream, at low-water mark.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

James T. Matlock, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was accused of the crime of selling and furnishing alcoholic liquor within no-license territory in the county of Tehama, on or about the twenty-second day of July, 1915, to wit, "at and on an island in the Sacramento River, near the boundary line of the city of Red Bluff, in said Tehama County, near the boundary line between supervisorial district No. 1 and supervisorial district No. 3 and within one or both, all of the territory within both said supervisorial districts of said supervisorial districts being then and there no-license territory," etc.

Defendant moved the court that plaintiff be required "to state in which supervisor district the alleged crime took place." The motion was denied. A demurrer to the information on various grounds was overruled and defendant pleaded not guilty. Upon the trial the jury found defendant guilty as charged in the information and the court accordingly entered judgment that defendant be imprisoned in the county jail for the period of 75 days. Defendant appeals from the judgment and from the order denying his motion for a new trial.

The evidence is uncontradicted that defendant sold alcoholic liquor as charged, the only question being, Was the liquor sold within no-license territory?

The place where the liquor was sold is a small tract of land called "Coney Island," and lies in the Sacramento River just

above the city of Red Bluff. At this point the east boundary line of district No. 1 is described, in the proceedings of the supervisors of September 7, 1880, thus: "Beginning at the junction of Cottonwood creek with the Sacramento river, running easterly along the west bank of the Sacramento river to Walnut street in the town of Red Bluff." The west boundary line of district No. 3 is described as "all that portion of Tehama county lying east of the Sacramento river."

It appeared that, about 20 or 25 years ago, this island was formed, and was then a small sandbar that "was out of the water in the month of September, and in the course of time some willows and cottonwood trees began to grow on it"; that it grew by accretions until now the island is "between five and six acres in extent. . . . It is overflowed in the wet season of the year, but reappears again in the dry season; . . . it is between 4 and 5 feet above the low water mark." It appeared further that for several years no water ran along the east side of the island in the summer, but now there is water around it at all times; that the main channel is west of the island; that the "main current has always flowed there," as one witness testified who had known the river at that point for 25 years. Between the island and the west bank of the river the distance is 132 feet and between the island and the east bank it is about 80 feet.

Appellant contends, first, that the demurrer should have been sustained for the reason that the information states two offenses—"one for selling alcoholic liquor and the other for furnishing alcoholic liquor"; second, that the court erred in denying defendant's motion to make the charge more specific; third, "The main proposition upon which defendant relies for a new trial is this, that the territory in which the alleged alcoholic liquor was alleged to have been sold and furnished is within a 'wet zone,' " and hence not "within no-license territory."

The demurrer was properly overruled. (*In re Johnson*, 6 Cal. App. 734, [93 Pac. 199]; *People v. Winkler*, 21 Cal. App. Dec. 695.*) The motion was based upon the same

*On January 17, 1916, the supreme court granted a petition to have this cause heard and determined in the supreme court after judgment in the district court of appeal, and said cause was then transferred to the supreme court for hearing and decision.

ground as urged against the information and was properly denied.

Upon the principal proposition, appellant at the outset calls attention to section 2349 of the Political Code, which declares the Sacramento River to be a "public way, between its mouth and the mouth of Middle Creek," which latter is in Shasta County. He cites *Hendricks v. Feather River Canal Co.*, 138 Cal. 423, [71 Pac. 496], where it was held: "If the navigability of the river should be deemed necessary to a boundary of the patent thereby, it must be presumed upon appeal, in the absence of evidence, that the river was navigable at the point in question." Section 830 of the Civil Code is cited, which provides that "except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders . . . upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." Also section 1016 of the same code is cited, where it is declared that, "Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary."

Appellant relies upon the case of *State v. Eason*, 114 N. C. 787, [41 Am. St. Rep. 811, 23 L. R. A. 520, 19 S. E. 88], which concerned the jurisdiction of a municipality bounded by a navigable river, and it was held that it does not extend beyond low-water mark, in absence of anything in the charter extending the limit of its jurisdiction expressly or by fair implication. As incorporated, the boundaries of the town of Beaufort began "at a cedar post in the Pamlico river," thence by several courses and distances away from the river, "thence on a line parallel with Washington street to Pamlico river, and thence with the river to the beginning." It was held in that case that the same rules of construction apply as in the case of a grant from one individual to another, and that an ordinance of the town of Beaufort prohibiting the throwing of fish or offal into the river was void for lack of jurisdiction, the boathouse from which the fish and offal were thrown being in the river outside the low-water mark, though immediately adjoining the town wharf.

Subject to whatever right the United States reserved to the control of the waters of the Sacramento River, for purposes of navigation or other purposes, undoubtedly the state was given the power to partition its territory into counties, including the beds of streams navigable or non-navigable, and was empowered to confer upon such counties the authority to exercise over all such partitioned territory the right to administer its government and to provide for the welfare of its inhabitants—for example, to construct highways, build bridges across navigable streams as parts of such highways, and generally to exercise police powers within such territory. The exterior boundaries of the county of Tehama fixed by statute concededly embrace all the territory included in the five supervisor districts. These supervisor districts were formed out of the territory comprising the entire county—five of them—at the same session of the board, on September 7, 1880. That was nearly ten years before this so-called island began to form. It was but a small sandbar 25 years ago. In construing the intention of the board in enacting the ordinance creating these districts, we must consider the then existing conditions; and we must also assume that the board intended to include within the boundaries of these several districts all the territory of the county, for the purpose, as declared, was to divide the county—all of it—into supervisor districts pursuant to law, and to carry out the objects of the statute by which certain duties were devolved upon the board chosen to administer the affairs of the several districts. It is not to be supposed for a moment that the board intended to leave strips of territory, without local government, lying between any two of the districts, whether consisting of land, or water, or both, and before such an intention can be imputed to the board or deduced from its action or nonaction, it should be made very clearly so to appear.

Ever since 1880, a period of 35 years, the supervisors have treated the Sacramento River, which bisects the county, as within their jurisdiction; have built costly bridges over it; established and maintained ferries across the river; and until the question arose in this case their right to so regard the river has never been disputed. We do not think that the rule applied to grants of land by one person to another is of unqualified application in this case. This partitioning of the territory of the county into administrative districts is not a

grant in the sense that term is used in section 830 of the Civil Code, *supra*. And if the rule as to grants were to apply, there is a presumption that the purchaser's title extends as far as the grantor owns in both tidal and fresh waters. (Gould on Waters, secs. 195, 196.) This presumption, it seems to us, would hold where a legislative body is partitioning for purposes of local government a territory over which it has undoubted jurisdiction.

Mr. Gould states another rule, to wit: "By the common law the boundary line *prima facie* between towns and parishes when separated by a fresh-water river, is its thread." (Gould on Waters, sec. 202.) Here the thread of the Sacramento River was shown by undisputed testimony to be to the west of "Coney Island," which latter would by this rule lie entirely within district No. 3.

In *King v. King*, 7 Mass. 499, it was held that, where land lying on both sides of a river is partitioned, the land on one side being granted to one and the land on the other side to the other of the parties, the division line will be the center thread of the stream. But apart from the rules of conveyancing, it seems to us that the view expressed in *Hamilton v. McNeil*, 13 Gratt. (Va.) 389, 394, is reasonable, and should apply here. In that case the question depended upon the construction of various statutes of the general assembly forming the counties of Bath, Pendleton, and Pocahontas (Va.), and fixing their boundaries. Said the court: "The court is further of the opinion that these acts being intended merely for the division and arrangement of the territory which they embrace for local municipal purposes and the convenient and economical administration of the government within the same, should not be construed with the same strictness which is to be observed in the construction of a grant or of a contract between individuals affecting the rights of property, but a more liberal beneficent rule should be adopted, the object being to ascertain the true meaning and intention of the legislature in any given act by considering the same in connection with all others *in pari materia* and with the general policy of the legislature. . . . Weight should be given to the contemporaneous interpretation placed upon the same by the courts and other lawful authorities within the same and by the population at large residing therein."

Without pursuing the question further, our conclusion is that the description of the respective boundary lines of the two districts should be construed so as to make the thread of the main channel of the river the dividing line between them, and hence the jury were justified by the evidence in finding that defendant was guilty of selling and furnishing alcoholic liquor in no-license territory, to wit, in district No. 3.

Error is claimed of an instruction given the jury by the court, in which the court said, in construing the language used in defining a boundary of district No. 3: "I instruct you that when it said east of the Sacramento river it meant east of the main thread of the channel of the Sacramento river. It does not say the east bank. It says, east of the Sacramento river, and that means any land east of the center of the main channel or thread of the Sacramento river. So, in this case, if you find that 'Coney Island,' is east of the main thread of the main channel of the Sacramento river, then I instruct you that it is in supervisor district number three." It was within the province of the court to construe the language used in describing the boundary, and the court very properly left it to the jury to say where Coney Island was situated with reference to the thread of the river.

The court did not err in refusing defendant's offered instruction that "if you find from the evidence that the east boundary line of supervisor district No. 1 runs along the west bank of the Sacramento river, then in that event, said Coney Island is not within said supervisor district No. 1." In no view that could have been taken of the evidence was the instruction applicable.

Error is also claimed in refusing an instruction "that if you find from the evidence that the east boundary line of supervisor district No. 3 runs along the west bank of the Sacramento river, then in that event, said Coney Island is not within said supervisor district No. 3." Probably defendant meant the west boundary line and not the east, as stated in the instruction, for the east boundary line is somewhere in the Sierra Nevada Mountains. The undisputed evidence was that the thread of the stream—the main channel of the river—was west of Coney Island. The court, as we have held, properly instructed the jury that the description given of the west boundary line of district No. 3 was the thread of the stream. The instruction requested would have left with the jury to

determine as a question of fact what the court had rightly disposed of as a question for the court. The instruction, assuming that the west boundary of district No. 3 was meant, would have made it coincident with the east boundary of district No. 1 and west of the Sacramento River, and, of course, west of its thread. In that view the island would undoubtedly be situated in district No. 3 and in no-license territory, and the instruction would have become a question of fact directly contrary to all the evidence.

We discover no error in any of the proceedings and the judgment and order are, therefore, affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 3, 1916.

[Civ. No. 1705. Second Appellate District.—February 4, 1916.]

PASSOW & SONS (a Corporation), Respondent, v.
HERMAN HARRIS et al., Appellants.

CONTRACT—SALE OF BILLIARD-TABLES—DELAY IN DELIVERY—WAIVER OF OBJECTION.—In a contract for the sale of billiard-tables, where the delivery of the tables was to be made "on or about the 5th day of June, 1915," and time was made of the essence of the contract, the words "on or about" are not to be construed to mean "exactly," but delivery within a reasonable time after June 5th would satisfy the condition, and a delay until June 9th was not an unreasonable lapse of time; and where on the latter date the purchasers advised the sellers of their inability to receive the tables and requested that they be shipped after June 20th, and on June 10th, after giving this last-mentioned notice, advised the sellers that they might be shipped on any date that was convenient, whereupon the latter immediately advised them that they would be shipped on the 17th of June, to which no objection was raised until the latter date, when the purchasers attempted to rescind their contract, but nowhere in the correspondence complained of any delay in delivery, the purchasers are estopped from complaining of delay in delivery.

LD.—TENDER—WAIVER OF.—In such a case, where the purchasers notified the sellers that they had revoked and countermanded the order, it was not necessary for the latter to make a tender of the physical property agreed to be sold before bringing suit for the purchase price.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Louis W. Myers, Judge.

The facts are stated in the opinion of the court.

Henry K. Norton, and Wilbur Bassett, for Appellant.

Schweitzer & Hutton, for Respondent.

JAMES, J.—Defendants by written contract agreed to purchase from the plaintiff three billiard-tables for an aggregate price of \$975. The office of plaintiff was at the city of San Francisco. In this contract it was agreed that \$225 should be paid as the initial payment and the sum of \$30 per month thereafter paid until the whole amount mentioned had been satisfied. The contract also contained this clause: "Shipped to Los Angeles on or about the 5th day of June, 1913, . . . " The contract in its other terms provided that when the total price had been paid a bill of sale should be given, and further provided that if the purchaser should "refuse to accept delivery of or to return the said goods, then the entire unpaid balance of this contract, with interest, shall in either of said cases immediately become due and payable and the said Passow & Sons may enforce payment of the entire amount, principal and interest then unpaid, or, if they so elect, they may cancel this contract and take possession of said goods, without legal process." A clause in the latter portion of the writing reads as follows: "In all matters herein mentioned time is declared the essence of this contract." Defendants at the time they entered into this contract owned three old tables, which it was agreed should be valued at \$225 and that amount credited as the initial payment on the contract for the new tables. Defendants refused to receive the new tables when offered to them and converted the old tables to their own use; whereupon this action was brought to recover the balance due under the contract for the sale of the new tables,

and also the sum of \$225 as the value of the old tables. Judgment was in favor of plaintiff. A motion for a new trial being denied, this appeal was taken from the order made in that regard and also from the judgment.

The evidence showed that upon the making of the contract plaintiff caused the new tables to be shipped from Chicago to San Francisco, at which latter place they were received. On June 9th the tables had not been shipped from San Francisco to the vendees in Los Angeles, and on that date the defendants wrote to the plaintiff that they had not sold any of the old tables, but that the plaintiff could, any time after June 20th, ship the three new tables to them. In a letter dated June 10th the defendants again wrote the plaintiff as follows: "I am writing to let you know that we sold the 3 tables about 1 hour after I wrote you yesterday. . . . You can ship 3 tables any day that will be convenient to you." In a letter dated June 11th the plaintiff replied: "Your three new tables will be shipped from here June 17th and will arrive in your city about three days later." In a letter dated June 16th defendants wrote the plaintiff as follows: "I wish to say that it will not be necessary for you to ship the tables ordered, and I herewith notify you that I countermand this order, as I have made other arrangements." The plaintiff immediately wired in response to this letter, stating to the defendants that it would insist upon the contract being enforced, and in a letter of the same date reiterated their determination in that regard, and requested that defendants give advice as to what date they desired the tables shipped; otherwise that the plaintiff would proceed against them. To this letter the defendants made response by telegram as follows: "Do not ship tables we revoked and countermanded order letter June sixteenth refuse to accept." The testimony showed that immediately following the receipt of this telegram the agent of plaintiff came to Los Angeles and demanded the delivery of the three old tables purchased by the plaintiff, and was told by one of the defendants that the tables were gone and that he did not know where they were. Defendants offered no testimony, but depended for their defense upon two principal contentions: First, that the condition as to delivery of the new tables on or about the 5th of June was not complied with, and that therefore the plaintiff was in default as to its obligation in that particular. Second, that there

was no sufficient tender made of the articles purchased prior to suit brought. We think there is no merit in either of these contentions, and that the failure of the defendants to fulfill their agreement is wholly without excuse in the law. It would appear that the phrase in the contract making time the essence thereof was more particularly designed to affect the conditions required of the defendants in the matter of the making of payments. But even though it may be said that strict compliance was agreed to be made as to all matters embraced within the terms of the contract, the parties themselves failed to make the delivery date certain and specific, for they provided that the delivery of the new tables should be "on or about the 5th day of June, 1913." "On or about" does not mean exactly, and to such a phrase the court would apply the construction that that condition is satisfied where delivery was made within a reasonable time after the 5th of June. And it may be fairly said that there had been no unreasonable lapse of time when, on June 9th, the defendants wrote stating in effect their inability to then receive the tables and requesting that they be shipped after the 20th of June. Then, on the 10th of June, after giving this last-mentioned notice, they advised the plaintiff that the three tables might be shipped on any day that was convenient. The plaintiff immediately advised them that the tables would be shipped on the 17th, one week later. No objection was raised to this date until the day before the 17th, when the defendants attempted to rescind their contract. In their correspondence they seem not to have complained of any delay in the matter of the delivery of the new tables, and it is very apparent that the reason for their action was something quite foreign to a contention of that sort. There is every reason for holding that the defendants by their conduct are estopped from raising any question as to the failure of the plaintiff to deliver in time. We think that the trial judge's conclusion, as it inferentially appears from the findings made, that no default was committed by the plaintiff in the performance of any of its obligations, is fully sustained by the evidence.

The plaintiff, upon the announced refusal of the defendants to proceed further under their contract or to accept the tables purchased, was under no obligation to make a tender of the physical property agreed to be sold. It acted strictly in accordance with a term of the contract which we have

quoted which covered the precise contingency that arose between the parties to the contract here involved. Moreover, plaintiff's action was directly in accordance with the provisions of the statute. "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." (Civ. Code, sec. 1440.)

There are no further points presented which call for or merit consideration.

The judgment and order appealed from are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 454. Second Appellate District.—February 4, 1916.]

THE PEOPLE, Respondent, v. JOHN A. WILSON,
Appellant.

CRIMINAL LAW—MURDER—INSTRUCTIONS—WHEN REFUSAL TO INSTRUCT ON MANSLAUGHTER ERRONEOUS.—In a prosecution for murder the court may properly refuse to instruct the jury that they may return a verdict of manslaughter, if the evidence clearly shows that the crime committed was not manslaughter; but where the evidence is such that the jury would be warranted in returning a verdict of manslaughter, it is prejudicial error for the court to refuse, at the request of the defendant, to instruct the jury that it might, if the evidence warranted it, find the defendant guilty of manslaughter.

1D.—MANSLAUGHTER—DEFINITION.—Manslaughter is the unlawful killing of a human being, without malice; and one of the conditions described in the code definition is that of an involuntary killing "in the commission of an unlawful act, not amounting to felony."

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Farnsworth & McClure, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

CONREY, P. J.—Defendant was convicted of the crime of murder in the second degree and sentenced to imprisonment for the term of twenty years. His appeal is from the judgment and from an order denying his motion for a new trial.

The principal assignment of error refers to the court's instruction to the jury that it might find the defendant guilty of murder in the first degree, or murder in the second degree, or not guilty, and the court's refusal to add to these alternatives an instruction that they might, if the evidence warranted it, find him guilty of manslaughter. The general rule is, as stated in the Penal Code, section 1159, that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." The attorney-general has called our attention to decisions of the supreme court which hold that in a prosecution for murder the refusal of the court to instruct the jury that they may return a verdict of manslaughter is not error, if the evidence clearly shows that the crime committed was not manslaughter. (*People v. Lee Gam*, 69 Cal. 552, [11 Pac. 183]; *People v. Fellows*, 122 Cal. 233, [54 Pac. 830], and other cases cited in those decisions.) We do not question the rules as stated, but they are not applicable to the record in this case. Brinkley, the deceased, was about 23 years old, and an attachment had grown up between him and a fifteen year old daughter of the defendant. The defendant had informed his daughter that he was opposed to her association with Brinkley, and had sent to the young man information to the same effect. On the morning of June 6, 1915, Brinkley went out riding on a motorcycle with defendant's daughter. The defendant purchased a revolver and started down the road in the direction they had taken. The defendant testified that he saw them coming toward him on the motorcycle and waved his hands, but they seemed to be coming faster. He testified further as follows: "Then I thought if I would pull the gun out of my pocket and wave

it at him, that he would surely stop then. . . . And when he passed me, just before he got to me, he said something to Dora, he says, 'I will, if I hit him,' . . . and he brushed me along the side here [showing] and on this rib, forearm, and kind of numbed that arm a little, . . . And at that time I struck at him with the gun in my hand, and the gun discharged. And whether I hit him or not, I didn't know, I wasn't thinking about shooting at all, I never thought of shooting. But when I struck at him the gun discharged. . . . And directly I seen the motorcycle turn to one side and they tumbled off, and then I thought he had been shot when the gun discharged. Then I came on up and Dora, she asked me if she should call a doctor, and I says, 'Yes, call one,' then I says, 'Wait a minute.' Some other parties had come in an automobile and I says, 'Wait, and maybe they can go quicker and call a doctor'."

Manslaughter is the unlawful killing of a human being, without malice. One of the conditions described in the code definition is that of an involuntary killing "in the commission of an unlawful act, not amounting to felony." (Pen. Code, sec. 192.) If the jury believed the testimony of the defendant, they might have reached the conclusion that in striking at the deceased the defendant was committing an unlawful act amounting to an assault, but without intending to shoot. The firing of the pistol under the circumstances shown endangered the life of his daughter as well as the life of Brinkley. Her arm was around the young man and the bullet did in fact pass through the middle finger of her right hand. There is no evidence that the defendant had ever threatened the life of Brinkley or that he entertained animosity toward him beyond the mere fact that he was unwilling to have the young man paying attentions to his daughter, who was still a young school girl. The testimony to which we have referred, with much other evidence to which we might refer, was abundantly sufficient to entitle the defendant to have the case go to the jury under instructions which would permit a verdict of manslaughter.

Counsel for defendant in their brief assert that the court erred in giving certain other instructions, and also in refusing to give sundry instructions requested by the defendant. These assertions are not accompanied by any argument or any reference to authorities bearing upon the questions in-

volved; and we will not discuss these instructions more than to say that, on the face of the record, we perceive no error in the court's rulings concerning them. So far as the refused instructions were correct and pertinent to the case, the substance of them appears to have been given in the court's instructions to the jury. Nevertheless, the error which was committed and to which we have referred was sufficient to seriously prejudice the defendant with respect to an important right of defense, and he is entitled to a new trial.

The judgment and order are reversed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 3, 1916.

[Civ. No. 1376. Third Appellate District.—February 5, 1916.]

WILLIAM SNYDER, Respondent, v. BEN MILLER et al., Appellants.

ACTION ON PROMISSORY NOTE—PLEADING—AMENDMENT OF COMPLAINT—

DATE OF ASSIGNMENT OF NOTE—DISCRETION NOT ABUSED.—In an action to recover on an assigned promissory note there was no abuse of discretion in allowing the plaintiff to amend his complaint when the case was called for trial, so that the date of the assignment would appear as of the date of the execution of the note, instead of the date mistakenly alleged in the original complaint, where the defendant was not placed at any disadvantage by the amendment, and his principal defense rested upon a release of the defendant from the note.

ID.—ALLOWANCE OF AMENDMENTS TO PLEADINGS.—The allowance of amendments to pleadings is a matter resting in the sound legal discretion of the trial court, and great liberality should be shown by it in permitting, where it can be done without working great delay, such amendments to pleadings as will facilitate the production of all the facts bearing upon the questions involved in the action.

ID.—CONSTITUTIONAL LAW—REVIEW OF EVIDENCE IN CIVIL CASES.—The recent amendment to section 4½ of article VI of the constitution, whereby appellate courts, in civil cases, are authorized, for certain indicated purposes, to examine "the entire cause, including the evi-

dence," etc., does not contemplate the review of the evidence with a view of determining where the preponderance lies, but that the evidence may be reviewed only for the purpose of determining whether the court may be required to hold that from any error in the misdirection of the jury, or in the admission or rejection of evidence, or as to any matter of pleading or procedure, a miscarriage of justice has resulted.

APPEAL from a judgment of the Superior Court of San Joaquin County. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

Light & Crane, and A. V. Scanlan, for Appellants.

A. H. Carpenter, for Respondent.

HART, J.—This is an action on a promissory note. Judgment passed for the plaintiff, and from said judgment the defendants take this appeal.

The record shows and, indeed, counsel for the appellants concede, that the judgment against the defendants, Rottenberg and Case, was entered upon their default, duly entered, on failure to answer the complaint, on the eleventh day of May, 1914, which was six months prior to the date of the taking this appeal. The appeal as to those defendants is, therefore, abortive, as counsel concede, and they have expressly abandoned the same.

The complaint sets out the note declared upon *in haec verba*. It was executed in favor of Roy Snyder, son of the plaintiff, for the sum of \$2,472.45, with interest at the rate of 7 per cent per annum, payable monthly, and provided for the payment of the principal sum in monthly installments of five hundred dollars, to be paid, beginning with the fifteenth day of July, 1913, on the fifteenth day of each succeeding month, until the total amount was paid in full, the last installment, however, which was payable on the fifteenth day of October, 1915, involving the sum only of \$472.45.

The complaint, as originally filed, alleged that, after the execution and delivery of said note, "and on or about the — day of June, 1913, and before said note became due or payable, the said Roy Snyder duly indorsed, assigned, and delivered said promissory note, for a valuable consideration,

to the plaintiff herein, who ever since has been, and now is the lawful owner and holder of said promissory note."

The answer of the defendant, Miller, admits the execution and delivery of said note as alleged in the complaint, but denies that the same was assigned by the payee named therein, Roy Snyder, at any time or at all, to the plaintiff for a valuable or any consideration. By way of avoidance, the defendant alleges that, on the twenty-second day of May, 1913, Roy Snyder, in consideration of the execution of a promissory note in his favor by the defendants, Rottenberg and Case, and which note was delivered to him, the said Roy Snyder executed and delivered to the defendant, Miller, a covenant of release and satisfaction and acknowledgment of full payment, so far as Miller was concerned, of the note in suit; "that at the time of the execution and delivery of said release and said last mentioned note herein, the plaintiff was present with plaintiff's assignor and had full knowledge of said release and satisfaction of said promissory note in plaintiff's complaint set forth."

When the trial of the cause was called, the counsel for the plaintiff asked, and the court granted, leave to amend the complaint so that the date of the assignment of the note by Roy to the plaintiff would appear as the "15th day of February, 1913," the date of the execution of the obligation, instead of the "— day of June, 1913," as originally alleged in the complaint.

The court found that the note had been executed and delivered and assigned, as alleged in the amended complaint; that the sum of one thousand five hundred dollars, and no more, had been paid thereon, and that the sum of \$1,159.61, and accrued interest, was still due thereon.

As to the special defense, the court found: "That the release set forth in the defendant Ben Miller's answer was made and executed on the twenty-second day of May, 1913, by the original payee, Roy Snyder, and that at that time the said Roy Snyder was a minor, under the age of twenty-one years, and had no right, power, or authority to make or execute such release, as he had theretofore, on the fifteenth day of February, 1913, sold, assigned, and transferred unto the plaintiff all his right, title, and interest therein; and that plaintiff was not bound by such release and had no knowledge that such release had been executed."

The general contention of the appellant, Miller, is that certain vital findings are not sustained by the evidence. There is a further objection that the court failed to find upon the special defense set up by the defendant, Miller, involving, as we have seen, the statement of new matter. Complaint is also made that, in allowing the plaintiff to amend his complaint in the particular above explained, the court abused its discretion.

Taking up, first, the last stated contention, we are, upon a consideration thereof, required to say that we are not justified in holding that the court abused its discretion in allowing the amendment. The object of the amendment was obvious from the face thereof. Precisely why the date of the assignment was not in the first instance alleged as of the fifteenth day of February, 1913, we are, of course, unable to say, but we may and must assume, from the amendment, that, from the plaintiff's understanding of the fact, a mistake in that respect was made in the complaint as it was originally drafted and filed. Of course, a party is entitled to state his case in his pleading as he understands the facts thereof and as he believes he can prove them. The defendant and his counsel were present when the amendment was prepared and made, and had no trouble in amending their answer so as to meet by denial the complaint as so altered. They asked for no continuance of the trial on account of the allowance of the amendment, and from this we may assume that they were as well prepared then to go on with a trial of the issues as at some future time. The only objection which appears to have been made by the attorney for the defendant to the proposed amendment was that, if allowed, it would necessitate an amendment of the answer. This was, of course, no valid objection to the allowance of the amendment. Very naturally, an amendment of a complaint in a material respect would call for an amendment of the answer.

The allowance of amendments to pleadings is a matter resting in the sound legal discretion of the trial court, and the appellate courts of this state have repeatedly declared that "great liberality should be shown by a trial court in permitting, where it can be done without working great delay, such amendments to pleadings as will facilitate the production of all the facts bearing upon the questions involved in the action." (Spelling on New Trial and Appellate Prac-

tice, sec. 107, and cases therein cited; *San Francisco etc. Soc. v. Leonard*, 17 Cal. App. 254, 267, [119 Pac. 405].) Of course, as was said in *Baxter v. Riverside Portland C. Co.*, 22 Cal. App. 199, [133 Pac. 1150], and in *Hayden v. Hayden*, 46 Cal. 333, some good reason should ordinarily be affirmatively disclosed justifying the amendment before the court acts favorably upon the proposition.

In this case, while the reason for the mistake was not shown, we think that where, as here, the defendant is put to no trouble or inconvenience or placed at no disadvantage by the amendment, and where his principal defense did not rest upon the question whether the note was duly executed or wholly upon the proposition whether it was assigned by the payee at a particular time or assigned at all, but upon a release of the defendant from the obligations thereof, it cannot well be said that the trial court abused its discretion by allowing the amendment. The object of judicial proceedings is to discover all the facts of the case as they actually occur and exist and apply the law thereto; and the theory of the code is that the parties should each have reasonable opportunity to present his side of the case upon the facts as he understands they actually transpired. (*Lower Kings River etc. Canal Co. v. Kings River etc. Canal Co.*, 67 Cal. 577, [8 Pac. 91].)

The facts as to which there is no controversy are as follows: That, at some time prior to the year 1913, the plaintiff bought and paid for a clothing store in the city of Stockton for his son, Roy Snyder, who was at that time, as well as at the time of the particular transactions involved herein, a minor, being somewhat near but less than twenty-one years of age. Prior to the seventh day of February, 1913, the defendants, Rottenberg and Miller, began negotiations looking to the purchase of said clothing store from young Snyder, and on the said seventh day of February, 1913, an agreement of purchase and sale, including the total price and terms, was finally reached by the parties and the same reduced to writing. Among the terms so agreed upon were that Rottenberg and Miller should pay to Snyder, Jr., one thousand dollars cash on the completion of an inventory of the stock and fixtures on hand, and the balance to be evidenced by several promissory notes, to be secured by a chattel mortgage on the stock of goods and the fixtures. The

agreement, according to its terms, was fully carried out and consummated on the fifteenth day of February, 1913, Among the notes given by Rottenberg and Miller to Snyder, Jr., is the one in question here.

The plaintiff and his assignor testified that the latter was, at the time of the sale of the store to the defendants and the delivery to him of the promissory notes, indebted to the former in the full aggregate sum of said notes, and that the notes were, on the fifteenth day of February, 1913, assigned to the plaintiff by his son, Roy Snyder, in payment of said indebtedness.

The chief ground of controversy here, however, proceeds from the instrument, executed by Snyder, Jr., on the twenty-second day of May, 1913, which, as seen, purported to release Miller from the obligations of the note in suit in consideration of the signing and indorsement of said note by the defendant, Case.

The defendant's claim is: 1. That the preponderance of the evidence is against the findings: That said note was assigned to the plaintiff by Roy Snyder on the fifteenth day of February, 1913, and that the plaintiff "is now and ever since has been" the owner and holder of said note; that "there is now due, unpaid, and owing to plaintiff from the said defendant, Ben Miller, on the said promissory note, the sum of \$1159.61"; that, at the time of the date of the purported release (May 22, 1913), the said Roy Snyder was a minor, under the age of 21 years, and had no right, power, or authority to make or execute such release, as he had theretofore, on the fifteenth day of February, 1913, sold, assigned, and transferred unto the plaintiff all his right, title, and interest therein"; that the "plaintiff was not bound by such release and had no knowledge that such release had been executed." 2. That, conceding that the assignment of the note to the plaintiff was made on the fifteenth day of February, 1913, the evidence shows that he had knowledge of and acquiesced in the execution of the release by his son.

As we have shown, the plaintiff and his son testified positively that the note in suit was, with others given by the same parties, sold and assigned to the plaintiff by Roy Snyder on the fifteenth day of February, 1913, the date of its execution, the consideration being a then subsisting indebtedness,

previously contracted, of Roy to his father. While opposed to this testimony there was some adversary showing, it was, of course, with the trial court to determine the truth of the matter, and its finding that the note was so sold and assigned at the time mentioned is conclusive upon us. But counsel declare that the plaintiff, in his testimony, contradicted the allegation of his verified complaint as to the time at which the note was indorsed over to him by his son, and point to certain decisions in which causes have been reversed for a conflict so arising. (See *Branson v. Caruthers*, 49 Cal. 374; *Guerrero v. Ballerino*, 48 Cal. 118.) In this case, however, as has been shown, the plaintiff amended his complaint in the respect referred to, and between the allegation thereof as to the time of the assignment of the note and the testimony of the plaintiff upon that point there is no conflict. As before stated, from the fact that the amendment was made, we must assume that the original complaint contained an erroneous statement in the particular referred to. At any rate, the amended complaint superseded the original complaint for all purposes of the trial and by its allegations the testimony of the plaintiff must be viewed and considered. In the cases above cited, the allegations between which and the testimony of the plaintiff there existed a conflict were contained in the complaints upon which the actions were tried.

As to the question of the understanding of the parties with respect to the transaction eventuating in the execution of the release referred to and upon which the defendant, Miller, relied as the ground of his resistance to this action, the evidence is also conflicting.

It appears that Miller, within a few months after he and Rottenberg purchased the clothing store, withdrew from the firm, or, in other words, he and Rottenberg dissolved their copartnership. Both Miller and Rottenberg desired that the former should be released from the note in dispute. Miller testified that he had had a conversation with Roy Snyder and the plaintiff, explained to them that he wished to be released from liability upon the note, and stated that the defendant, Case, would indorse the note as security for the payment thereof by Rottenberg if he (Miller) was released. On the twenty-second day of May, 1913, when the release was executed in the office of an attorney in the city of Stockton, both the plaintiff and Roy Snyder were present, the

latter, as seen, affixing his signature to the release in the presence of all the parties. This testimony was corroborated by Case and the attorney in whose office the transaction was executed. On the other hand, the plaintiff testified that the sole purpose and effect of the instrument, as it was explained to him and as he understood it, was merely to release the chattel mortgage given on the goods in the store to secure the notes in consideration of the indorsement of the note in suit by Case. He said that Mr. Rottenberg had previously called upon him at his home and said that he (Rottenberg) was going to buy Miller's interest in the store, and "he wanted me to take Mr. Miller's name from the note. I went to Mr. McNoble's office and Mr. McNoble said that could not be done; they had a mortgage on the store—security for this second note. . . . Roy had a mortgage on the store. Mr. McNoble had advised him that a mortgage was not a very good thing to leave on the store. Finally they said if they would get Mr. Case to indorse this note—Mr. Case had not indorsed this note until that day—they asked me if they would get Mr. Case to indorse the note would Roy release the mortgage. I said yes, I thought that would be all right. Mr. Case signed that note in Mr. McNoble's office that day." The plaintiff further testified that the first time he ever saw the release which is pleaded in the answer was in the office of Mr. Freitas, one of the attorneys for the defendant, after this action was commenced. The attorney named, on that occasion, asked the plaintiff if he had ever seen the instrument before. "I told him you know I never had. I was surprised that such a thing existed. That was a new thing to me."

Roy Snyder testified that he clearly understood that the sole consideration for the indorsement of the note by Case was the release by him of the chattel mortgage on the store. He declared that he had no recollection of signing the release, although he admitted that it bore his signature. He said that, on the twenty-second day of May, he went to the county recorder's office and caused to be entered a release of the mortgage, and, he testified, "the only thing I remember signing was at the recorder's office, signing there the release of the mortgage."

Thus we have shown sufficient of the testimony on both sides to demonstrate that there is a clear conflict upon the

question of the purported release of the defendant Miller. While, as is true in a majority of the cases, where a conflict upon disputed points of fact exists, the evidence in this case might uphold a finding the other way, still, in the very nature of things, where, as here, there is a substantial conflict in the evidence, a court of review cannot substitute its judgment for that of the trial court or jury upon the effect of the evidence. Assuming that Roy Snyder did execute the release with a clear understanding of its full import, still, if he did so without the authority of his assignee of the note and subsequent to the assignment, his act was, of course, without force or effect. He had disposed of his interest in the note and had no more authority to release an indorser thereon or the payers thereof than if he were wholly a stranger to it or to the transaction culminating in its execution and delivery to the payee. And the testimony of the plaintiff is that he did not authorize his son to execute the release nor did he after its execution acquiesce in or ratify the act of his son in that particular. The finding based upon this testimony is, under the well-known rule whereby reviewing courts must be governed with respect to conflicting evidence, binding upon this court.

Counsel for the appellant insist, however, that, under the recent amendment to section 4½ of article VI of the constitution, whereby appellate courts, in civil cases, are authorized, for certain indicated purposes, to examine "the entire cause, including the evidence," etc., it is within the competence of this court to review the evidence with a view of determining where the preponderance or the weight of the evidence lies. We do not think that the constitutional provision contemplates a task so impossible of accomplishment by courts of appeal.

The language of that section of the constitution, fashioned after that of a constitutional provision of similar import applicable to criminal cases, provides that "no judgment shall be set aside, or new trial granted, in any case, on the ground of the misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In *Vallejo etc. R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 554, [147 Pac. 238, 243], Mr. Justice Shaw, speaking of that amendment and applying it to that case, thus construed the power of the appellate courts thereunder: "It has always been the desire and policy of this court to disregard unimportant and unsubstantial errors appearing in the record, and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties. Our power to do this has hitherto been somewhat limited by the limitations upon our jurisdiction to consider the evidence (*San Jose Ranch Co. v. San Jose etc. Co.*, 126 Cal. 324, [58 Pac. 824]). An important result of the aforesaid amendment is that it enlarges our jurisdiction in that particular. Prior to its adoption, if the evidence was in substantial conflict as to a fact in issue, we were concluded by the decision of the trial court thereon for all purposes of the case, unless the error entered into and affected the consideration of that evidence. Under the above section, we have the power to review conflicting evidence for the purpose of ascertaining whether or not an error 'has resulted in a miscarriage of justice.' It is, indeed, made our duty to do so, and the further duty is imposed to disregard manifest error when, upon such examination, we shall not 'be of the opinion that the error complained of has resulted in a miscarriage of justice.' It is no longer the case that injury is presumed from error; the injury must appear affirmatively to the mind of the court after the examination required, or from the nature of the error itself. (*People v. O'Bryan*, 165 Cal. 55, 56, [130 Pac. 1042].)"

As we understand the foregoing language, the true construction of the constitutional provision referred to is, so far as appellate courts are concerned, that the evidence may be reviewed or examined, not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies, but only for the purpose of determining whether the court may be required to hold that from any error in the misdirection of the jury, or in the admission or exclusion of evidence, or as to any matter of pleading or of procedure, a miscarriage of justice has resulted. The provision applies to trial courts in the matter of passing on motions for a new trial, and, of course, such courts, having heard the testimony, are in a position to pass

upon the probative value of the testimony, and, indeed, they are often called upon to do so on such motions. It is, however, obviously different with reviewing courts, since they know, and can know, nothing of the deportment of the witnesses as they give their testimony, which is an indispensable criterion for the determination of the question of the weight which may and should justly be accorded their testimony. Of course, where the testimony upon which a verdict or a finding is based is characterized by such inherent weakness as to justify the conclusion that it is insufficient to uphold the verdict or the finding, then a question of law arises, in which case, as in the case of any other question of law, an appellate court may review it. The case here does not come within that category, there being nothing inherently improbable in the testimony of the plaintiff and his son, the latter being at the time of the alleged execution of the release a minor, with perhaps little, if any, understanding or a clear perception of the legal effect of such transactions as the one involved herein.

There is obviously no ground upon which to sustain the complaint that the court failed to find on the special defense pleaded by the defendant, Miller, said defense involving the setting up of new matter. The above quoted finding is a reply to the objection in this particular.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 332. Third Appellate District.—February 5, 1916.]

THE PEOPLE, Respondent, v. WILLIAM B. OLIVER,
Appellant.

CRIMINAL LAW—CONTRIBUTION TO DEPENDENCY OF MINOR—SUFFICIENCY OF INFORMATION.—An information charging a defendant with the crime of contributing to the dependency of a minor sufficiently states a public offense under the juvenile court law, where, after alleging that the minor was a female child of the age of fifteen years, without parent or guardian capable of exercising proper parental control over her, and that she "was and is wayward and addicted to vicious habits, and was and is in danger of being brought

up to lead an idle, dissolute, and immoral life," it charges him with encouraging, causing, and contributing to such dependency by enticing and persuading such minor surreptitiously and without the consent of her father to leave and remain away from her home, and to meet, be, and remain with the defendant under cover of darkness until a late and unusual hour of the night.

ID.—EVIDENCE—OTHER ACTS OF IMPROPER CONDUCT.—It is permissible to show that the defendant on other occasions than the specified date laid in the information had been guilty of improper conduct with the minor, as under the juvenile court law any conduct upon the part of a person toward a minor which either causes or tends to cause such minor to become or remain a dependent or delinquent person may be shown, and such conduct may consist of one act only or a series of acts.

ID.—LACK OF PARENTAL CONTROL—SUFFICIENCY OF EVIDENCE.—The allegation in the information that the minor had no parent or guardian capable of exercising proper control over her is sufficiently established, by evidence showing that the child's father, who was her only guardian at the time in question, was either incapable of exercising or unwilling to exercise proper parental care over her.

ID.—CONVICTION OF DEFENDANT—SUFFICIENCY OF EVIDENCE.—A verdict of conviction is sufficiently supported by evidence showing a wayward minor female, with a strong inclination toward a wild and indifferent life, obtuse to perceptions of morality, without a parent or guardian capable of properly controlling her or her conduct, holding clandestine meetings at late hours of the night with a married man, almost old enough to be her father, and permitting him to take liberties with her person which would lead to immoral practices of the grossest character.

APPEAL from a judgment of the Superior Court of Shasta County, and from an order denying a new trial.
J. E. Barber, Judge.

The facts are stated in the opinion of the court.

M. G. Gill, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones,
Deputy Attorney-General, for Respondent.

HART, J.—The defendant was convicted in the superior court of Shasta County of the crime of contributing to the dependency of an alleged dependent child, and appeals to this court from the judgment and the order denying him a new trial.



The information upon which he was tried and convicted reads as follows: "That on or about the fourteenth day of June, 1915, at the town of Cottonwood, in the said county of Shasta, state of California, one Josephine Fa Mar, then and there a female minor child, under the age of eighteen years, to wit; of the age of fifteen years, was then and there a female dependent minor child, in this, that the said Josephine Fa Mar had no parent or guardian capable of exercising proper parental control over the said Josephine Fa Mar, and for want of such parental control, said Josephine Fa Mar was and is wayward and addicted to vicious habits, and was and is in danger of being brought up to lead an idle, dissolute and immoral life, and that the said defendant then and there willfully, unlawfully, and feloniously, on or about the said fourteenth day of June, 1915, at Cottonwood, in the said county of Shasta, state of California, did encourage, cause, and contribute to the dependency of said Josephine Fa Mar, by the said defendant, then and there enticing and persuading said Josephine Fa Mar, surreptitiously and without the consent of W. W. Fa Mar, the father of the said Josephine Fa Mar, to leave and remain away from the home of said Josephine Fa Mar, in the said town of Cottonwood, and to meet, be, and remain with said defendant under cover of darkness until a late and unusual hour of the night."

The defendant contends that the information does not state a public offense, and that the evidence is insufficient to support the verdict.

The information states an offense under the so-called juvenile court law, and the demurrer thereto was, therefore, properly overruled.

By section 3 of said law, as amended by the legislature of 1913 (Stats. 1913, p. 1285 et seq.), it is, among other things, provided that "within the meaning of this act the words 'dependent person' shall include any person: (1) Who has no parent or guardian willing to exercise, or capable of exercising proper parental control, and for the want of such proper parental control, such person is wayward and addicted to vicious habits, and is in danger of being brought up to lead an idle and dissolute, or immoral life. . . ."

Section 28 of said act reads, in part, as follows: "Any person who shall commit any act or omit the performance of

any duty, which act or omission causes or tends to cause, encourage or contribute to the dependency or delinquency of any person under the age of twenty-one years, as defined by any law of this state, or any person who shall, by any act or omission, threats or commands or *persuasion*, endeavor to induce any such person, under twenty-one years of age, to do or to perform *any act or follow any course of conduct*, or to so live as would *cause or manifestly tend to cause* any such person to become, or to remain, a dependent or delinquent person, shall be guilty of a misdemeanor," etc.

The information, it will be observed, after alleging that the alleged dependent minor is a female child of the age of fifteen years, that she is without a parent or guardian capable of exercising proper parental control over her, and that for want of such proper control, she "was and is wayward and addicted to vicious habits, and was and is in danger of being brought up to lead an idle, dissolute, and immoral life," with clearness and directness charges the defendant with the commission of certain specific acts toward said minor which, if true, could certainly have no other effect than to tend to contribute to said minor's dependency within the description of that offense as it is defined by the statute. Indeed, if the acts of the defendant, as charged in the information, toward and with a female child of the immature age of fifteen years did not constitute an endeavor on the part of said defendant to induce the said child to follow a course of conduct which would "cause or manifestly tend to cause" her to become a dependent person or to remain one if already such a person, then it is difficult to conceive of conduct upon the part of a male person toward such a minor, short of that of outraging her person, which would have such effect. And the specific acts of which the defendant is accused are set forth in the information with sufficient clearness definitely to apprise him of the precise nature of the charge which he was thereby called upon to meet, and when this is done an information or indictment meets all the requisites of such a pleading, assuming, of course, that an offense known to the law is so stated.

It is next contended that, in permitting the people to show that the defendant on other occasions than the specific date laid in the information had been guilty of improper conduct with the minor, the court committed error damaging to the



rights of the accused, since, so it is claimed, the district attorney, at the beginning of the trial, elected to rely upon the specific acts alleged to have been committed "on or about the fourteenth day of June, 1915."

It is argued in support of that contention that the rule is that evidence of the commission of "other similar offenses" to the one charged is never admissible to prove the specific charge set out in the information or indictment. The general rule is as stated by counsel for the defendant, but it has its exceptions. There are certain classes of crime, to corroborate the proof of the commission of which, or to show a disposition in the accused to commit offenses of the nature of the one charged, other acts or offenses similar to the one specifically charged may be shown. Among these classes are the crimes of rape, seduction, and the like, and even some offenses of an entirely different nature. Such other acts or offenses, however, "are never admissible as independent substantive offenses, upon any of which a conviction can be had, but evidence of them is only admissible after the prosecution has selected some particular act of a date certain, and has introduced evidence tending to support the selection." (*People v. Koller*, 142 Cal. 621, 624, et seq., [76 Pac. 500, 501], and authorities therein cited.)

But, as we conceive the situation presented here, evidence of the several acts of the defendant which were shown for the purpose of establishing against him the crime charged in the information is admissible not alone upon the theory of the rule above stated. Under the so-called juvenile court law, any conduct upon the part of a person toward a minor which either causes or tends to cause such minor to become or remain a dependent or delinquent person may be shown, and such conduct may consist of one act only or a series of acts. While one of such acts may be sufficient to constitute the specific crime of contributing to the dependency of the minor, a number of different acts leading to the same result can have the effect of doing no more. For illustration: a male person might, on a single occasion, persuade and induce a female minor to resort to the grossest acts of immorality. This would be sufficient to establish the crime of contributing to the dependency of such minor within the clear intent of the statute. On the other hand, the male person might succeed, only after repeated acts of persuasion, in leading the female

minor into the course of conduct which would put the stamp of dependency upon her under the statute, in which case the male person would be guilty, not of as many different and distinct crimes as there are acts leading to the same general result, but, as in the case of the one act as above illustrated, of the single crime of contributing to the minor's dependency. Therefore, while it is true that the information alleges that the crime of which the defendant is thereby accused was committed "on or about the fourteenth day of June, 1915," it was competent to prove that, in addition to the particular act mentioned in the information, other acts of a similar character and tendency had been committed by the accused upon said minor.

It is next insisted that one of the elements of the offense as it is described by the statute and charged in the information is that the minor named therein was without a parent or guardian willing to exercise or capable of exercising proper parental control over her, and that, since said minor was shown to have a father, at whose home she resided, that requisite of the offense charged was not proved. But the record contains sufficient evidence to show that the child's father, who was her only guardian at the times concerned here, was either incapable of exercising or unwilling to exercise proper parental care over her.

Fa Mar, father of Josephine, is a musician by profession, and, at the times of the occurrences resulting in the preferring of the charge alleged in the information against Oliver, was engaged in teaching music in the Lincoln public school, at Red Bluff. He resided, however, in the village of Cottonwood, Shasta County, a short distance from Red Bluff, and upon the days appointed for the teaching his classes in music he would go by train from his home to Red Bluff. His wife was, and had been for some months, an inmate of the Napa State Hospital for the Insane, and his family, all living with him in Cottonwood, then consisted of six children, the eldest of whom was Josephine, the alleged dependent, aged about 16 years. The other children, of whom one was a boy, ranged in age from 4 to 13 years. Josephine, after her mother was committed to the state hospital, took charge of the home and was supposed to look after the younger children. Fa Mar testified that Josephine had a very bad disposition. Often she would become angry at her father and would not speak

to him for a period of ten days or two weeks, and on occasions would while in a passion break the dishes used at the eating-table. In brief, without going further into the details of the evidence directly presented by the people upon this point, it is enough to say that the general trend and tenor and effect of Fa Mar's testimony was that either he was incapable of properly controlling Josephine or was unwilling to attempt to do so. But not upon the testimony of the prosecution alone is it necessary to found the conclusion that Fa Mar was either wholly incapable of exercising proper control over the young woman or wholly unwilling to do so; for the defendant himself, both upon cross-examination of the people's witnesses and by his own direct testimony, brought out facts strongly indicating that Fa Mar either could not control Josephine or had no desire or disposition to do so in a proper way. On cross-examination, Josephine was made repeatedly to say that her father often mistreated her by cursing her and calling her opprobrious names. On one occasion he said to her that she could leave home if she desired to and remain away forever; that he had gotten along well without her before she came into the world and could get along equally as well without her in the future. Furthermore, on the presentation of his defense, the defendant, through several witnesses introduced by him, brought out testimony which, if true, showed that Fa Mar abused all his children outrageously, frequently calling them "little dirty s— of b—hs." So, assuming that the people failed to make full proof upon the point under consideration, it is manifest that the defendant supplied it, and on the whole evidence the jury were apparently justified in finding that Fa Mar was either incapable of bestowing upon Josephine proper parental care or was unwilling to do so, or both incapable and unwilling; for a parent who would deport himself in the manner so described toward his minor children is obviously unfit, and, indeed, justly may we add, if he be a person of ordinary intelligence, unwilling to exercise that care and control over his minor offspring which their tender years and consequent immature judgment imperatively require.

The last contention is that the evidence is insufficient to support the verdict. The defendant was, at the trial, so confident of his ground upon this point that he moved the court to advise the jury to find a verdict of acquittal, which motion

was denied. But as the record is presented to us, there is a little merit to the point as we found in the other points above considered and disposed of.

A detailed statement of the facts is not necessary. In addition to those above stated, it will suffice, for the purposes of the present consideration, to say that from the testimony the jury could have found, and doubtless did find, these facts to have existed: That the defendant, aged about 33 years, is a man of family, consisting of a wife and five children; that he resided with his family in the town of Cottonwood, and a few blocks from the residence of Fa Mar; that he became acquainted with the Fa Mar family, and on one or two occasions worked for Fa Mar, assisting the latter to prepare some of the equipments of a moving picture show, which business Fa Mar was about to launch; that defendant became attracted to Josephine and held secret meetings with her; that, while Fa Mar was absent from home—at Red Bluff, from which place, on Monday of each week, he usually returned home not before 9 or half-past 9 o'clock at night—the defendant would call on Josephine, and, on several occasions, was with her in her bedroom; that at her home, on one occasion, he talked to her about sexual intercourse, kissed her, and put his hand under her clothes; that he addressed letters to her, of which some he mailed, one he sent to her by a young man, and others he dropped on the porch of her home as he was passing by; that Josephine, on one occasion, pretending to retire, left her room and the house after her father and the younger children had gone to bed, and met the defendant, at between 9 and 10 o'clock, at the public school building in Cottonwood, where they sat together on the ground, he throwing his arms about her body, kissing her and placing his hands under her clothes; that, on said occasion, he talked to her about sexual intercourse, and that Josephine returned to her home at about between the hours of 2 and 3 o'clock in the morning; that, on other occasions, Josephine, without the knowledge or consent of her father, left home and remained away all night.

Thus it is plainly apparent that a case, within the intent of the statute, was made against the accused. A wayward minor female, with a strong inclination toward a wild and indifferent life, obtuse to perceptions of morality, without a parent or guardian capable of properly controlling her or her conduct, holding clandestine meetings at late hours of the

night with a married man, almost old enough to be her father, and permitting him to take liberties with her person which, in nine cases out of ten, will lead to immoral practices of the grossest character, what more should be required to establish a case of contributing to the dependency of a minor, within the contemplation of the juvenile court law?

There is, it is true and as might reasonably be expected, a conflict in the evidence upon the vital points involved in the charge. The defendant himself not only positively denied committing the acts of which he was accused by Josephine and the corroborating witnesses, but declared in effect that his attentions to Josephine were inspired solely by a desire to protect her against the abusive treatment to which she was subjected by her father, and to this end permitted her on one occasion to remain overnight at his home, and called upon Fa Mar to talk to him about and in behalf of his daughter. And he introduced witnesses whose testimony corroborated to some extent his asseverations of innocence. But all this testimony, when placed side by side with that produced by the people, merely had the effect of creating a conflict, which it was solely the function of the jury to solve. They having decided that conflict against the claims of the accused, and there being an apparent justification for the result reached by them in the evidence brought to their attention by the people, it is not for this court to say that their judgment, thus evidenced, is erroneous or not sufficiently fortified by the proofs.

The judgment and the order appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1734. First Appellate District.—February 7, 1916.]

CHARLES B. CRANE et al., Appellants, v. WILLIAM H. ROACH et al., Respondents.

BUILDING CONTRACT—SPECIFIC PERFORMANCE—WHEN NOT ENFORCEABLE.

Courts of equity will not specifically enforce building contracts where performance cannot be consummated by one transaction, and when the contract, according to its terms, requires a succession of acts and a protracted supervision, with special knowledge and skill in its oversight and management.

ID.—CONTRACT OF SALE—INTEREST IN LAND—WHEN NOT ENFORCEABLE.

When a contract for sale of real estate is for any reason incapable of specific performance, it cannot form the basis of a valid claim to an interest therein, and when such claim is asserted, the owner of the real estate is entitled to a decree quieting his title thereto.

ID.—AGREEMENT TO ERECT HOUSE AND RESELL PROPERTY—ACTION TO QUIET TITLE BY SELLER—CLAIM OF INTEREST IN PROPERTY BY PURCHASER—FORM OF JUDGMENT.—In an action in the usual form to quiet title to a certain house and lot, by one holding the legal title, in which the defendants by cross-complaint set up a contract between plaintiffs and defendants, providing, among other things, that in consideration of the transfer by defendant to plaintiffs of the land in question, and an agreement by the former to pay the latter a certain balance, the plaintiffs should erect a building upon the land according to certain plans and specifications, the purpose of the conveyance of the land being to secure performance of the contract on the part of defendant to repurchase the lot and building thereon, and the evidence showed that plaintiffs failed to live up to the terms of their contract, in that they did not erect the building according to the plans and specifications, whereupon the defendant claimed an interest in the real property adverse to the plaintiffs, the trial court properly decreed that the plaintiffs should keep the house and lot and pay to the defendant the amount of her outlay plus the enhanced value of the lot, the court having found that the defects in the building were irremediable and depreciated the value of the building.

ID.—PLEADING — ADEQUACY OF CONSIDERATION — FAIRNESS AND REASONABLENESS OF AGREEMENT.—In such a case, although the answer and cross-complaint do not in terms allege the adequacy of the consideration or the fairness of the agreement, where they do in formal allegations set forth the facts constituting the defense and the circumstances under which both parties entered into the contract, the statement of facts is sufficient, and a demurrer thereto is properly overruled.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. J. D. Murphy, Judge presiding.

The facts are stated in the opinion of the court.

C. L. Brown, for Appellants.

Thomas F. Graber, for Respondents.

KERRIGAN, J.—This is an appeal by plaintiffs from a judgment against them and from an order denying their motion for a new trial.

A general statement of the facts of the case is as follows: In the month of July, 1908, the Berkeley Development Company was the owner of the land described in the complaint subject to a written contract to convey to the defendant Elizabeth D. Roach upon payment of the sum of \$1,750, this sum being payable in installments. In the month of July, 1911, the defendant named had paid on account of this sum \$1,088.83, leaving a balance of \$661.17 unpaid. The lot of land, it seems, had between the two dates mentioned appreciated in value in the sum of \$750, making the equity of Elizabeth D. Roach therein of the value of \$1,838.83. At this time the defendant named made an assignment of her agreement with the Berkeley Development Company and conveyed all her right, title, and interest in and to the lot of land to the plaintiffs, whereupon the plaintiffs paid the balance due (\$661.17) to the development company, and received from it a deed to the lot. As part of the transaction between Elizabeth D. Roach and the plaintiffs they entered into a written contract, whereby the latter were to erect within ninety working days a dwelling-house for the former according to certain plans and specifications. Under the terms of this contract the plaintiffs agreed to sell and convey to Elizabeth D. Roach (whom we will hereafter refer to as the defendant) the lot and house to be erected thereon for the sum of \$5,515, upon which sum was to be immediately credited the amount previously paid by the defendant upon the lot, to wit, \$1,088.83, the balance to be paid in monthly installments, together with interest, and upon the completion of the payments the plaintiffs were to convey the premises to the defendant by good and sufficient deed, free from encumbrances.

The complaint is in the usual form to quiet title. The defendants filed an answer and cross-complaint, denying in their answer some of the allegations of the complaint, and setting forth in their cross-complaint in legal verbiage the details of the transaction between the parties. Demurrers to both the complaint and cross-complaint were overruled, and the plaintiffs put in an answer to the cross-complaint. The evidence introduced upon behalf of the defendants showed that the house erected by the plaintiffs under the contract above mentioned differed from the plans and specifications in many material and substantial respects; that omissions and devia-

tions ran through the whole building and are practically irremediable.

Judgment went for the defendants for the sum of \$1,838.83, with interest thereon in the sum of \$186.64, and for their costs, the court further decreeing that upon payment to the defendant of the judgment the plaintiffs would be entitled to have their title to the premises quieted against all claims of the defendants.

We cannot agree with the contention of the plaintiffs that the evidence fails to support the findings. The record teems with evidence that the plaintiffs, in the erection of the house contracted for, departed grossly from the specifications. The court found, and the evidence shows, that the second floor of the house is not 8 feet in the clear as specified; that the basement is not 7 feet in the clear; that the foundation wall in the rear of the building is not level with the footings; that the underpinning is not 16 inches in centers; that the materials of which the building is constructed are not of the best kind, nor is it built in a workmanlike manner. An enumeration of the instances wherein the building as erected fails to comply with the plans and specifications fills about seven closely printed pages of the record; and the court concludes by finding that the house as constructed is less in value by one thousand dollars than it would have been if erected as agreed. Moreover, it appears to have been built in the improper manner described deliberately, and in spite of the constant protest of the defendants.

It appears to be settled law that courts of equity will not specifically enforce building contracts where, as here, performance cannot be consummated by one transaction, and when the contract, according to its terms, requires a succession of acts and a protracted supervision, with special knowledge and skill in its oversight and management (*Stanton v. Singleton*, 126 Cal. 657, [47 L. R. A. 334, 59 Pac. 146]; and that when a contract of sale of real estate is for any reason incapable of specific performance, it cannot form the basis of a valid claim to an interest therein, and that when such claim is asserted, the owner of the real estate is entitled to a decree quieting his title thereto (*Jolliffe v. Steele*, 9 Cal. App. 212, [98 Pac. 544]; *Valentine v. Streeton*, 9 Cal. App. 640, [99 Pac. 1107])). But in this case, while the defendants set up in their cross-complaint the contract, which, as we have seen,

provided, among other things, for the erection of a building according to certain plans and specifications, and prayed for its specific performance, it is also to be noted that they set forth other facts constituting their cause of action; and as the prayer of the cross-complaint was for general as well as for specific relief, the court was warranted, it would seem, in granting any relief consistent with the facts pleaded and proven. From the outline of the facts already given it appears that the lot of land in question was conveyed to the plaintiffs as security for the performance by the defendant of the conditions of the contract to repurchase the lot with the dwelling-house erected thereon; and certain it is, according to the evidence accepted by the trial court, that the plaintiffs failed to live up to the terms of their contract, whereupon the defendant had and claimed an interest in the real property adverse to the plaintiffs, which was a proper subject matter for consideration and adjustment in this action. Inasmuch as the plaintiffs claimed that the building was erected according to the plans and specifications, and that the lot and building were well worth the contract price—while, on the other hand, it is the contention of the defendants that the specifications were not followed, resulting in the erection of a house of inferior value, and that the only way to remedy the defects therein would be to tear down and rebuild it, it seems to us that the decree of the trial court that the plaintiffs keep the house and lot, and pay to the defendant the amount of her outlay plus the enhanced value of the lot, is a judgment eminently equitable and just.

We perceive no merit in the plaintiffs' further contention that their demurrers to the defendants' answer and cross-complaint should have been sustained, for the reason that they do not show that the consideration moving to the plaintiffs under the agreement was adequate, and that the agreement as to them was just and reasonable. It is true that the defendants' pleadings do not in terms allege the adequacy of the consideration nor the fairness of the agreement, but they do in formal allegations set forth the facts constituting their defense and the circumstances under which both parties entered into the contract, and their statement of facts in this regard is sufficiently proof against the objection raised by the demurrer now referred to. (*Windsor v. Miner*, 124 Cal. 492, [57 Pac. 386].)

We have examined the other assigned errors, but find nothing in them that would warrant this court in reversing the judgment or order appealed from.

Judgment and order affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 6, 1916.

[Civ. No. 1491. Third Appellate District.—February 7, 1916.]

CALARA VALLEY REALTY COMPANY (a Corporation),
Respondent, v. **C. B. SMITH and GEORGE O. RICH,**
Defendants; **C. B. SMITH,** Appellant.

ACTION FOR GOODS SOLD—PLEADING—FAILURE TO DENY INDEBTEDNESS—

COUNTERCLAIM.—In an action for the recovery of a balance due upon an open book account for goods, wares, and merchandise sold and delivered, the failure of the defendant to expressly admit or deny the allegations of the complaint does not deprive him of the right to set up a counterclaim growing out of contract, as an offset to the indebtedness pleaded in the complaint, notwithstanding the amount of such counterclaim exceeds the amount of the plaintiff's demand and that no affirmative judgment is asked for by the defendant.

ID.—FAILURE TO DENY ALLEGATION — ADMISSION.—Where a defendant fails to deny a material fact alleged in a complaint, such failure is tantamount to an admission of the fact so alleged.

ID.—PLEADING OF COUNTERCLAIM—TENDER OF ISSUE.—The pleading of a counterclaim without directly denying the allegations of the complaint is sufficient to tender an issue upon the question whether the plaintiff is entitled to a judgment for the full amount of the claim or any part thereof upon which he has sued, and the right to support such special defense is not affected by the fact that the alleged counterclaim exceeds that of the debt sued for by the plaintiff, and that the defendant asks for no affirmative relief.

ID.—CODE PROVISIONS AS TO COUNTERCLAIMS—INTENT OF LEGISLATURE—
AVOIDANCE OF MULTIPLICITY OF ACTIONS.—The evident intent of the legislature in passing the code provisions relating to counterclaims was that all the matters that may be the subject of litigation between the parties within the limitations prescribed shall be settled in one action.

APPEAL from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Gavin McNab, and R. P. Henshall, for Appellant.

Ross & Ross, and J. J. Lermen, for Respondent.

HART, J.—This is an appeal, by the alternative method, by the defendant, Smith, from the judgment entered in the above-entitled action.

The action is for the recovery of the sum of \$729.30, a balance due the plaintiff from the defendants upon an open book account for goods, wares, and merchandise sold and delivered by the former to the latter.

The defendant, Smith, answering for himself, without expressly denying the allegations of the complaint, set up a counterclaim, and in this behalf alleged that the plaintiff "was, and now is, indebted to this defendant and to one George O. Rich, upon an open book account, for commissions due and unpaid by said plaintiff to said Smith and Rich, and for and on account of services rendered by them to said plaintiff, in the sum of eighteen hundred dollars; that no part of said sum has been paid," etc.

As and for "a further and separate answer and defense" to plaintiff's cause of action, the defendant, Smith, pleads another counterclaim in detail, setting out in substance the contract whereby he and Rich were employed to sell the real property of the plaintiff, for which they were to receive from the plaintiff, as compensation, commissions upon the gross selling price of the property sold by or through them and their agents and employees; that the said Smith and Rich performed the services called for by said contract, and that by reason of said services there accrued to their credit the sum of one thousand eight hundred dollars, no part of which has been paid, etc. This answer was verified.

Smith asked for no affirmative relief, the prayer of his answer merely reading: "Wherefore, said defendant prays that plaintiff take nothing by this action, and that he have judgment for his costs."

Several months after Smith filed his answer to the complaint, the defendant, Rich, for himself, filed an answer, in

which he expressly admitted "each and all the allegations of the complaint," and "prays judgment that the plaintiff recover in accordance with the prayer of his complaint, and that he have judgment against his codefendant for one-half of the indebtedness mentioned in said complaint."

The defendant, Smith, at the opening of the trial, asked leave of the court to amend his answer by "setting forth another counterclaim as a defense, showing certain moneys had and received by plaintiff." The proposed amended answer, the counsel stated, was then in course of preparation. The court said: "When we get to it you can file it if it is sufficient." The proposed amended answer was subsequently, during the progress of the proceedings, offered by the attorney for Smith, and the court refused to permit it to be filed on the ground that it was not in proper shape to tender an issue.

The respondent first objects that, inasmuch as there is not in the transcript as certified to this court the testimony offered by the defendant and excluded by the trial court, there is before us no record justifying a review of the assignments of error upon which the appellant relies.

It is true that certain documentary evidence offered by the defendant, Smith, which the court would not admit, and the proposed amended answer of the said defendant, are not incorporated in the record. Since it is true that the proposed amended answer is not incorporated in the record of the proceedings of the trial as it is presented to us, it manifestly cannot be determined by this court whether the trial court was right or wrong in its ruling refusing permission to file it.

As to the documentary evidence offered by the defendant, Smith, it is to be remarked that, while Smith's attorney explained, when he offered it, that its purpose was to support the special defense or counterclaim, and that it would have the effect of showing the authority, in writing, in the form of a memorandum contained in the books of the plaintiff, and signed by the latter, in the defendants to sell real property for the plaintiff, thus invalidating any objection which might be raised by reason of the provisions of the statute of frauds prescribing the mode of vesting and attesting authority in a party to sell the real estate of another, the court not only refused to admit the testimony, but would not permit counsel to read the entries from the books into the record.

The question to be decided here, however, does not hinge upon the proposition whether the court erred in disallowing Smith to file his proposed amended answer or upon the question whether the evidence offered and rejected was or was not relevant, material, and competent, but wholly upon the construction which (it is clear from the record before us) the court put upon the answer as filed by the defendant, Smith, and upon which construction the court would not admit evidence in support of the defense so pleaded. The ground upon which the court excluded all evidence submitted by Smith in support of his counterclaim is repeatedly stated and given in the record, and it is manifest that the action of the court in that regard amounted in legal effect to a ruling that said answer does not state facts sufficient to constitute an answer or defense to the complaint.

The court in effect held that, inasmuch as the said defendant, by his answer, made no direct answer to the allegations of the complaint, no issue was tendered by his said answer, notwithstanding that therein Smith set up a counterclaim, growing out of contract, as an offset to the indebtedness pleaded in the complaint. That this was the ground upon which the court excluded evidence offered in support of the counterclaim is, as before declared, clearly shown by the statement, repeatedly made by the court, in its rulings sustaining objections to testimony offered by Smith, that the answer raised no issue, as the following colloquy between the court and the attorneys for the respective parties will show:

"Mr. Ross (Attorney for Plaintiff): If you will notice, your Honor, they set up a counterclaim of fifteen hundred dollars and in their prayer they do not ask for that. Mr. Mordicai (Attorney for Smith): We set up a counterclaim. We do not have to ask for an affirmative judgment. The Court: Now, let us see, gentlemen. The plaintiff claims there is \$729.30 due. Mr. Mordicai: Yes, sir. The Court: And do you deny it? Mr. Mordicai: No, sir. The Court: And you do not ask for anything in your prayer. You do not ask anything but your costs. That is all you ask and you admit there is \$729.30 due the plaintiff and you do not ask anything. . . . The prayer of the complaint is that they have judgment for \$729.30, isn't it? Mr. Mordicai: Yes, your Honor. Court: And you admit that? Mr. Mordicai: Oh, no. Court: Where is your answer to it. Mr. Mordicai: Why,

these counterclaims are an answer to it. Court: Where is your denial? Mr. Mordicai: There is no denial. They say that they sold us goods to the amount of some \$900 and that we paid a couple of hundred dollars on it, leaving some seven hundred. Now, we do not deny that, but we say that in turn they owe us on another bill which we seek to offset against that as a defense but not as an affirmative judgment. Now, that is our answer to the \$729.30. We could not deny that they sold us those goods and that we only paid a certain amount on that bill, but we say they owe us for other things upon other contracts which we now counterclaim as a defense. Court: I may be obtuse in my mind to-day; I have a cold. But I really cannot see any merit in your answer, Mr. Mordicai. I have tried to but I cannot see that your answer amounts to anything at all; I cannot. I cannot see that you have any answer that raises any issue whatever. Your answer is not worded properly to raise an issue to act as a counterclaim. Mr. Mordicai: Of course, there has been no point made by counsel here that it does not state facts sufficient to constitute a counterclaim or defense. Court: He gets in under his objections." Subsequently, while the defendant, Rich, was on the stand, and after he had testified that he was president of the plaintiff corporation, the attorney for Smith asked said Rich a question to which the attorney for the plaintiff objected, and the court, sustaining the objection, said: "Mr. Mordicai, I will say frankly to you that I think: there was a chance for you to raise an issue in your pleadings here and bring the matter properly before the court, but as the pleadings now stand I do not think you have any show in court."

Thus it will be seen that the court would not permit the defendant, Smith, to make any showing whatever upon his alleged counterclaim, the ground of the rulings in all instances being in effect that said defendant had not raised an issue by his answer; and after repeated unavailing efforts to prove his defense, Smith, through his attorney, stated to the court that he had nothing further to offer. Thereupon the court gave the plaintiff judgment on the pleadings.

We think the court's construction of the answer and its rulings based upon its theory of said pleading were erroneous.

The defendant, Smith, was, of course, entitled to set up a counterclaim (Code Civ. Proc., sec. 437, subd. 2), and that the

counterclaim pleaded by him was one existing in his favor and against the plaintiff, between whom a several judgment might be had in the action, and arising out of a cause of action upon contract (Code Civ. Proc., sec. 438), there is no ground for doubting.

While unquestionably it would have been the better course for Smith to have expressly admitted the indebtedness pleaded by the plaintiff and then have set up his counterclaim as a special defense by way of avoidance, still it is well settled that where a defendant fails to deny a material fact alleged in a complaint, such failure is tantamount to an admission of the fact so alleged. It follows that the failure of Smith to deny the indebtedness upon which the plaintiff declared amounted in legal effect to an admission by him that the indebtedness so pleaded existed against him. Under this view, Smith was authorized by the sections of the code above referred to to set up a counterclaim as an offset to the indebtedness charged against him by the complaint.

A similar situation arose in the case of *Valley Lumber Co. v. Wood*, 4 Cal. Unrep. 1, [33 Pac. 343], although the precise point presented here was not raised. In that case, the complaint was in two counts, the first for \$503.19, for goods sold and delivered, and the second for \$83.20 for goods sold and delivered by another party and the claim therefor assigned to the plaintiff. The defendant made no denial of the first count, but denied that he is or was indebted to the assignor of the plaintiff in any sum exceeding \$81.20, and, in addition to this and the denial of the assignment of the claim on which the second count was based, he pleaded a counterclaim to each of the counts of the complaint.

In *Freeman v. Seitz*, 126 Cal. 291, [58 Pac. 690], which was an action to recover a certain sum of money for beef furnished by the plaintiff to the defendant, the latter, without denying any of the allegations of the complaint, pleaded a counterclaim. The plaintiff demurred to the defendant's answer, but the demurrer was based solely upon the ground that the court was without jurisdiction to entertain the counterclaim because it involved in amount a sum less than three hundred dollars. The point presented here was not raised nor referred to in that case, the appeal therein having been taken by the defendant from the judgment entered by the trial court upon the order sustaining the demurrer to his an-

swer on the ground above stated. But, notwithstanding that the point was not in those cases directly decided, it is to be assumed that it was at least thought by the attorneys in the cases that the point was destitute of merit. At any rate, we are, as stated, of the opinion that the pleading of a counterclaim without directly denying the allegations of the complaint is sufficient to tender an issue upon the question whether the plaintiff is entitled to a judgment for the full amount of the claim or any part thereof upon which he has sued. Nor can we see that his right to support his special defense can in any manner be affected by the fact that his alleged counterclaim exceeds that of the debt sued for by the plaintiff and that he asks for no affirmative relief.

If the defendant, Smith, as his explanation of his proposition to file an amended answer would indicate is true, has another and distinct claim from the one pleaded by him against the plaintiff, growing out of contract, and which is not barred, he should be permitted to amend his answer by setting it up, and thus enable the court to settle in this action all the matters of difference existing between the plaintiff and Smith and sounding in contract. As the court said, in *Freeman v. Seitz*, 126 Cal. 291, [58 Pac. 690]: "The law abhors a multiplicity of actions, and the evident intent of the legislature in passing the code provision (above referred to) was that all matters that may be the subject of litigation between the parties within the limitations prescribed shall be settled in one action."

The judgment is reversed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 6, 1916.

[Civ. No. 1847. Second Appellate District.—February 7, 1916.]

FRANK BRYSON, as Administrator, etc., Respondent, v. SECURITY TRUST & SAVINGS BANK, etc., Appellant.

BANKING LAW—WITHDRAWAL OF SAVINGS BANK DEPOSITS BY PUBLIC ADMINISTRATORS—CONSTRUCTION OF STATUTE.—The act of 1909, as amended in 1911 (Stats. 1909, p. 87; Stats. 1911, p. 1007), providing that the public administrator, upon an order countersigned by a judge of the superior court, may withdraw, without notice, money of a decedent where the same may be required for the purposes of administration, "or otherwise," creates a special right which must be complied with upon the part of the bank, with the condition that a compliance with those provisions of the statute will not impose upon the bank a liability against which it is not provided to be indemnified.

ID.—LOSS OF PASS-BOOK OF DECEASED DEPOSITOR—CONDITIONS OF DEPOSIT—COMPLIANCE NOT ESSENTIAL.—Where the pass-book of a deceased depositor has been lost and never been regularly transferred by the depositor, the bank cannot insist upon compliance with the printed conditions in the book as to publication of notice of loss and the furnishing of indemnity, as a condition to the payment of the deposit to the public administrator.

ID.—PASS-BOOK—WITHDRAWALS OF MONEY—PRODUCTION OF BOOK—NON-NEGOTIABLE INSTRUMENT.—A pass-book of a savings bank depositor is a non-negotiable instrument, where it is recited in the printed conditions stated therein that the book should be presented with every deposit made and check drawn, as such condition contemplates an order signed by the depositor separate from the delivery of the book.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

L. H. Roseberry, and J. H. Shankland, for Appellant.

Mott & Dillon, and G. C. O'Connell, for Respondent.

JAMES, J.—Plaintiff, as public administrator acting in the estate of J. D. O'Neil, deceased, brought this action to recover a sum of money alleged to have been deposited with the

defendant, a banking corporation doing a savings business, by his intestate. The judgment was in favor of the plaintiff and the defendant appeals, presenting its several contentions for reversal upon the judgment-roll.

After alleging preliminary matters respecting the death of O'Neil and the appointment of the administrator and the deposit of the sum of \$500 by said O'Neil with the defendant, it was stated in the complaint that plaintiff had been unable to surrender to the defendant the deposit-book issued to decedent, and "that said deposit-book has never come into the possession of said plaintiff and that said plaintiff has never had any knowledge or information as to the whereabouts of said deposit-book and said plaintiff is informed and believes and therefore alleges that said deposit-book was lost by said deceased prior to his death and that accordingly said plaintiff is unable to comply with any demand or requirement of said defendant banking corporation for the return to it of said deposit-book." As to this latter allegation the answer of defendant contained no denial. The answer admitted that the defendant held a deposit to the credit of J. D. O'Neil in the sum of \$448.80. It was then alleged that the depositor had agreed with the bank that the deposit should remain without withdrawal, except by mutual consent, for a term or period of six months, and that the contract should be evidenced in writing by a pass-book which was delivered to the depositor under an agreement that no payment should be made in any case unless the pass-book should be presented and the amount entered therein, and that the pass-book should be presented at the bank with every deposit made and check drawn; that a provision of the by-laws of the defendant corporation to which the said O'Neil assented was as follows: "At the final settlement of a deposit account, any pass-book relating thereto shall be returned to the corporation, to be placed there on file. In case any depositor shall lose his pass-book, or the same shall be destroyed or fraudulently abstracted, immediate notice thereof shall be given to the corporation, and after, First: notice of loss, destruction or fraudulent abstraction published once a week for four consecutive weeks in a daily newspaper published in the city of Los Angeles at the expense of the depositor, and Second: after the corporation shall have been properly indemnified and secured against all loss and liability to loss, a duplicate pass-book may be issued to the depositor." It was further al-

leged that printed in the pass-book was a clause, to which the depositor assented, in the following terms: "Depositors are alone responsible for the safe keeping of the book and the proper withdrawal of their money. No withdrawal will be allowed without the book and the book is the order for the withdrawal." It was denied that any notice of loss or destruction of the pass-book had been given to defendant. The court made up its findings determining the issues in favor of the plaintiff, and found that at the time of the making of the deposit there was in force and effect a by-law, a copy of which was printed in the pass-book issued to O'Neil, embodying the matter set out in the answer as first above quoted; also, that there was printed in the pass-book the clause last quoted above.

It is insisted, first, by the appellant that the finding respecting the loss of the pass-book was insufficient. We must bear in mind that no issue was raised as to the loss of the book by the answer, and therefore no finding as to that matter was necessary to be made. There was no demurrer to the complaint. However, we have examined the allegations of the complaint and think that the statement as to the loss of the pass-book was sufficient as an allegation of the fact, and that there was no inconsistency between the allegation as to plaintiff's lack of knowledge of the whereabouts of the book and his allegation as to its loss. A statute of this state provides that the public administrator, upon an order countersigned by a judge of the superior court, may withdraw, without notice, money of a decedent where the same may be required for the purposes of administration, "or otherwise." (Stats. 1909, p. 87, as amended in 1911; Stats. 1911, p. 1007.) Under the state of the case as presented by the record submitted, we do not think it necessary to here determine whether the acceptance of a pass-book by a depositor, with conditions printed therein but not expressly assented to by the words or signature of the depositor, binds the depositor to all of the conditions so printed in the book. For the purposes of this decision, we may assume that it does. What, then, is the legal situation presented? We have it admitted that the book was lost; hence it follows that if it has gotten into the hands of a third person, that third person, as a finder of it, would have no claim against the bank, and could not show any legal title to the book or the credit represented therein. The bank has made no claim that it has paid out any money

to any holder of the book other than the original depositor. With the knowledge that the book had been lost, any action of the bank in paying over money to the finder or holder of the book would be with the knowledge that the person presenting the same had no right thereto. It has been held in cases where the conditions stated in the book were phrased in such a way as to make a stronger case upon this contention in favor of the bank debtor, that such books were not negotiable. (*Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.) Counsel for appellant are undoubtedly correct in saying that the contract requiring the production of the book at the time of withdrawal of money and that the bank would pay to the holder of the book money on deposit, is one which is binding upon the parties. In the case just cited, however, it is said: "The book was not a negotiable instrument. Though such an evidence of a right may be assignable by delivery, the delivery must be accompanied with the intent to assign. That intent is not established by the possession of the book merely. An officer, in the exercise of ordinary care, would or should in such a case, ask for further evidence of right to demand payment. The natural and easy evidence to be given, would be the order of the depositor upon the bank, for the payment of money to the holder of the book. So, when an order is required, or is produced with the book without previous requirement it is a material thing, whether it be forged or not, and the paying agent of the bank is called upon to scrutinize, and compare and verify it." In addition to the case cited, there may be added reference to *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, [54 Am. Rep. 653, 4 N. E. 123]; *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418. In other words, that there is a duty in such cases always resting upon the bank to use ordinary care to ascertain that the pass-book is in the hands of a legal holder. The condition stated in the printed notice accompanying the pass-book as issued to O'Neil contemplated, where money was withdrawn, not only that the book should be presented, but that checks should be drawn; therefore, the plain understanding was that an order signed by the depositor, separate from the book, should be a prerequisite to the payment of the deposit. We are going somewhat afield in this last discussion, for, as has already been pointed out, in no event could the bank be made liable to a third person for the deposit of the money of O'Neil.

The book is admitted to have been lost and not to have been regularly transferred by the depositor. Assuming that whether threatened with possible liability or not, the bank might, as between itself and its depositor, insist upon a literal compliance with the conditions as to publication of notice of loss of the book and the furnishing of indemnity for the issuance of a new book, the same right, we apprehend, does not exist in the bank where the depositor has died and the money is required by the administrator. The statute referred to authorizes the public administrator to collect summarily, where his order is countersigned by a judge of the superior court, moneys on deposit with a savings bank, and we think this creates a special right which must be complied with upon the part of the bank, with the condition that a compliance with those provisions of the statute will not impose upon the bank a liability against which it is not provided to be indemnified. In so far as the statute might affect the latter result, it, of course, would be beyond the power of the legislature to enact. In the view we have taken of the matter, no liability will be cast upon the defendant by payment to plaintiff of the amount of the deposit.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 460. Second Appellate District.—February 7, 1916.]

THE PEOPLE, Respondent, v. WILSON P. HARLAN,
Appellant.

CRIMINAL LAW—SEXUAL OFFENSES—EVIDENCE—PROOF OF SIMILAR OFFENSES.—In cases involving sexual offenses, such as adultery, rape, and the commission of lewd and lascivious acts upon the body of a child, evidence of similar offenses committed between the parties, both prior and subsequent to that with which a defendant is charged, may, if not too remote, be introduced after the prosecution has selected some particular act of a date certain, and has elected to rely on proof of such act for a conviction of the defendant, and has introduced evidence tending to support the selection.

ID.—COMMISSION OF LEWD ACT UPON CHILD—SIMILAR OFFENSES—PREJUDICIAL ERROR.—In a prosecution for the commission of a

lewd and lascivious act upon the body of a girl twelve years of age, it is error to permit the state to offer evidence as to acts constituting a similar offense alleged to have been committed on a date subsequent to that alleged in the information, where there was not at the time of the introduction of such evidence any evidence whatever adduced tending to show the commission of the offense alleged in the information.

ID.—TIME OF ELECTION OF OFFENSES.—In a prosecution where the district attorney is at liberty to prove one of several different offenses under the indictment, he should, at least as early as the commencement of the trial, inform the defense upon proof of what specific offense he intends to rely, and if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and unless the precise offense is proven, the defendant is entitled to an acquittal.

ID.—EVIDENCE SHOWING COMMISSION OF OTHER OFFENSES—PURPOSE—ERRONEOUS INSTRUCTION.—An instruction advising the jury that other lewd and lascivious acts had been shown by the evidence to have been committed by the defendant, and that such evidence was introduced for the purpose of proving the illicit relations of the defendant with the prosecuting witness, is error.

APPEAL from a judgment of the Superior Court of Imperial County, and from an order denying a new trial. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

H. L. Welch, and Duke Stone, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

SHAW, J.—Defendant was, by information filed charging him therewith, convicted of the offense defined in section 288 of the Penal Code and sentenced to prison for a term of five years.

He prosecutes this appeal from the judgment and order of court denying his motion for a new trial.

As stated in the information, the act constituting the crime occurred on April 3, 1915. As usual in such cases, the verdict is based upon the uncorroborated testimony of the prosecutrix, a girl twelve years of age, who was the step-daughter of defendant.

Notwithstanding defendant was charged with an alleged act committed on April 3d, the district attorney, as he might do, in presenting the case first proved the commission of a similar act claimed to have been committed on April 17th. After presenting in full detail the occurrences of April 17th, he then directed the attention of the witness to alleged acts of defendant constituting the same offense committed on April 3d; whereupon defendant's counsel demanded that the district attorney make an election as to which particular act (that committed on April 3d or that committed on April 17th) he relied upon for a conviction of defendant, to which the trial judge replied: "I don't consider that it is necessary to, under the information on file, make any election as to the different offenses, if more than one was committed there." Therefore, however, and after much colloquy between counsel and the court, all in the presence of the jury, the court made a ruling stating: "It will be necessary to proceed to prove the *corpus delicti* in regard to the alleged offense that occurred on the third day of April," but overruled defendant's motion to strike out all evidence as to the offense alleged to have been committed on April 17th, proof of which, as stated, had theretofore been made. The prosecution then proceeded to question the witness as to what occurred on April 3d, the answers to which tended to prove the commission of the crime alleged as of that date; and also offered evidence as to several other acts alleged to have been committed with her by defendant. After completing the examination of the prosecutrix, and with all this evidence as to the several offenses before the jury, the district attorney then stated that he elected to rely for the conviction of defendant upon the evidence touching the commission of the offense on April 3d. In cases involving sexual offenses, such as adultery, rape, and the offense with which defendant is charged, the law seems to be well settled that evidence of similar offenses committed between the parties, both prior and subsequent to that with which a defendant is charged, may, if not too remote, be introduced. But, as stated in *People v. Koller*, 142 Cal. 621, [76 Pac. 500], "they are never admissible as independent substantive offenses, upon any of which a conviction can be had, and evidence of them is only admissible *after* the prosecution has selected some particular act of a date certain, and *has elected* to rely on proof of such act for a conviction of the defendant, and

has introduced evidence tending to support the selection." (Italics ours.) Measured by this rule, it was clearly error for the court to permit the prosecution to offer evidence as to acts constituting a similar offense alleged to have been committed on April 17th, as corroborating proof of the offense with which defendant was charged as having committed on April 3d, there being at the time no evidence whatever adduced tending to prove the commission of such last mentioned offense; and hence it was likewise error for the court to deny the motion made by defendant that such evidence be stricken out. In *People v. Williams*, 133 Cal. 165, [65 Pac. 323], Justice Temple of the supreme court, in discussing a question similar to that here involved, said: "I think the prosecuting officer, when he commences the trial of a case of this class, where he is at liberty to prove one of several different offenses under the indictment, should, at least as early as the commencement of the trial, inform the defense upon proof of what specific offense he intends to rely, and if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and unless that precise offense is proven, the defendant is entitled to an acquittal." Applying this rule, the prosecution should be deemed to have selected the act claimed, as shown by the prosecutrix, to have been committed April 17th, as that upon which to rely for a conviction of defendant. However this may be, it was at least but fair to the defendant, since the district attorney, notwithstanding the date specified in the information, might have selected either the alleged act committed on April 17th or that committed on April 3d, in proof of both of which he offered evidence, that the court should, at the stage of the proceedings when demanded by defendant, have required the prosecution to make an election between said acts.

The court stated to the jury in one of the instructions given, that "evidence of other acts of lewd and lascivious conduct of the defendant toward —, prior to and subsequent to the acts relied upon for a conviction herein, have been shown in evidence. This evidence is introduced for the purpose of proving the illicit relations of the defendant with —, and the lewd and lascivious disposition of the defendant, and his proneness to commit a crime of the particular nature involved." The effect of the first part of this instruction was for the court to invade the province of the jury by stating

that other lewd and lascivious acts *had been shown by the evidence to have been committed by defendant*, and this, notwithstanding the fact that her uncorroborated statements with reference thereto were denied by defendant. It was for the jury, not the court, to determine whether or not such alleged facts had been *shown* by the evidence. Moreover, the evidence was not introduced for the *purpose*, as stated, of proving illicit relations of the defendant with —, but merely to show, if it did show, a disposition and tendency on his part to commit lascivious acts with the prosecutrix, thus rendering it probable that he had, on April 3d, committed the offense with which he was charged, and for no other purpose. (*People v. Mathews*, 139 Cal. 527, [73 Pac. 416].) While these errors may be technical, nevertheless, considering the entire evidence, together with the fact that at least a part of the uncorroborated story of the prosecutrix seems incredible, we are of the opinion that they are not mitigated by section 4½ of article VI of the constitution.

The judgment and order are, therefore, reversed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 458. Second Appellate District.—February 9, 1916.]

THE PEOPLE, Respondent, v. JOE BARBERA, Appellant.

CRIMINAL LAW—DESTRUCTION OF INSURED PROPERTY—SUFFICIENCY OF INDICTMENT—NAME OF OWNER OF PROPERTY AND BENEFICIARY OF INSURANCE IMMATERIAL.—In a prosecution for the crime defined by section 548 of the Penal Code, that is, of willfully burning insured property with intent to defraud the insurer, it is not necessary to allege in the indictment the name of the person to whom the property belonged, or who was the beneficiary of the insurance, the essential facts being that the property was insured against loss, and that the defendant burned or otherwise destroyed the property with intent to defraud or prejudice the insurer.

ID.—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.—The contention that the evidence was insufficient to show any intent on the part of the defendant to defraud the insurance company, based on the claim that testimony of certain witnesses for the state was unworthy of belief, rather than on any claim that there was no evidence tending to prove such criminal intent, cannot be maintained on appeal, as the question was one for the jury.

ID.—EVIDENCE—PHOTOGRAPHS OF BUILDING AFTER FIRE.—There was no error in admitting in evidence certain photographs taken a few hours after the fire, showing the burnt building at the time the photographs were taken.

ID.—INSTRUCTIONS—DEFINITION OF MALICE IN ARSON—HARMLESS ERROR.—As the crime charged was not arson, an instruction given at the request of the people defining malice as a necessary ingredient in the offense of arson should have been omitted, but the giving of it did not constitute prejudicial error.

ID.—ALLEGED MISCONDUCT OF DISTRICT ATTORNEY—OFFERING EVIDENCE OF OTHER FIRES.—The conduct of the district attorney on several occasions in attempting to introduce testimony showing former fires which had occurred on the same and other premises belonging to one of the defendants, to which evidence objection was sustained, was not prejudicial, where the record shows that the offer was made in good faith and not for the wanton purpose of raising a prejudice against the defendant, and no suggestion was made during the trial of misconduct of the district attorney.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Carter & Torchia, for Appellant.

U. S. Webb, Attorney-General, Robert M. Clarke, Deputy Attorney-General, and Roberto B. Camarillo, for Respondent.

CONREY, P. J.—The defendant appeals from the judgment and from an order denying his motion for a new trial.

The defendant and one Salvatore Turco were jointly indicted and accused of the crime of burning and destroying property insured. It was charged that the defendants, at a stated time and place, did willfully, etc., burn, injure, and destroy certain property, to wit, a certain store building situate as described in the city of Los Angeles, which said property was then and there insured against loss and damage by fire in the London Assurance Corporation, with the intent then and there and thereby to defraud and prejudice the insurer. This defendant demurred upon several grounds, one being that the facts stated did not constitute a public offense, and another being that the indictment was not direct and

certain with respect to the offense charged, and that it did not, with sufficient particularity to constitute a complete offense, state the circumstances thereof. The defect claimed and upon which appellant relies is the omission to state in the indictment the name of the person to whom the property belonged, or who was the beneficiary of the insurance.

This prosecution was not for the crime of arson. It was that defendants committed the crime defined in section 548 of the Penal Code, as follows: "Every person who willfully burns, or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person, or of any other, is punishable by imprisonment in the state prison not less than one nor more than ten years." In a prosecution for this offense the defendant might be guilty even if the property belonged to himself, and a statement of the fact that the property burned was property of any particular person is not essential to a complete description of the offense. The essential facts are that the property was insured against such loss, and that the defendant burned or otherwise injured or destroyed the property with intent to defraud or prejudice the insurer. The question of ownership would arise only as a matter of evidence for the purpose of showing that the person in whose favor the policy had been issued had an insurable interest in the property described in the policy. The order overruling the demurrer was not erroneous.

This defendant, who was tried separately from the defendant Turco, claims that the evidence was insufficient to show any intent on the part of Barbera to defraud the insurance company. The argument in support of this proposition is based upon the claim that the testimony of certain witnesses for the state was unworthy of belief, rather than upon any claim that there is no evidence tending to prove such criminal intent. Since the jury believed this testimony, we are not authorized to find that it was untrue. It appears from this evidence that this defendant is the person who set fire to the building, that he did this under instructions from Turco, and that Turco had told him that after he would collect the insurance and have his bills paid that he and Barbera would divide up the balance of the money. The commission of this crime

was encouraged by a detective, who wormed himself into the confidence of the defendants, and who was in the employ of the insurance company and whose testimony is a part of the evidence which led to the conviction of this defendant. All of the argument directed against the credibility of the testimony of such witness relates to circumstances which were appropriately submitted to the jury for their consideration. They did not affect the admissibility of the testimony or the rulings of the court thereon.

There was no error in admitting in evidence certain photographs taken a few hours after the fire, showing the appearance of the building at the time the photographs were taken. The conditions illustrated by these photographs were corroborative of the testimony of witnesses showing what they found on the premises at and after the fire, and under the circumstances shown, the time of taking the photographs was not so remote from the time of the fire as to render such photographs inadmissible.

Appellant complains that the court erred in giving people's instruction No. V, defining malice as a necessary ingredient in the offense of arson. Since the crime charged was not arson, this instruction should have been omitted; but the giving of such instruction does not, in our opinion, constitute such prejudicial error as will alone require a reversal of the judgment or authorize a new trial. The other assignments of error with respect to instructions given and with respect to instructions refused are without merit.

Finally, it is claimed that the district attorney was guilty of misconduct, because on several occasions he attempted to introduce testimony showing former fires which had occurred on the same and on other premises belonging to the defendant Turco. Objections to this evidence were sustained by the court. Our reading of the record indicates to us that the offers of this evidence by the district attorney were made in good faith and not for the wanton purpose of raising a prejudice against the defendant. Also, we observe that no suggestion of misconduct of the district attorney was made during the trial; and in view of the court's rulings, it cannot be said that the defendant suffered prejudice by reason of these acts of the prosecuting officer.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Crim. No. 461. Second Appellate District.—February 9, 1916.]

**THE PEOPLE, Respondent, v. SALVATORE TURCO,
Appellant.**

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION OF DEFENDANT.—Under section 1323 of the Penal Code, which provides that if a defendant in a criminal action offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief, the cross-examination is not necessarily confined to the particular details expressly contained in the questions on direct examination, but the people have the right to draw out anything which will tend to contradict the evidence of the defendant adduced on his direct examination or weaken or modify its effect.

ID.—BURNING OF INSURED PROPERTY—PROPER CROSS-EXAMINATION OF DEFENDANT.—Where, in a prosecution for the crime of burning and destroying insured property for the purpose of defrauding the insurance company, the defendant, as a witness on his own behalf, made denial upon direct examination that he had given any money to certain persons for the purchase of materials to be used in burning the property, or that he had anything to do with the preparations for the fire or any knowledge thereof, it is not error to permit the people on cross-examination to ask the defendant a series of questions covering conversations to which one of such persons had testified as having had with the defendant on the subject of the burning of the property.

ID.—IMPEACHMENT OF DEFENDANT—RECALL OF WITNESS IN REBUTTAL.—It is not error to permit the people to recall in rebuttal the witness who had testified to some conversations had with the defendant, and allow him to testify as to the particular conversations which the defendant denied, by asking him whether certain quoted statements were made, instead of requiring the witness to state the conversation in his own language.

ID.—CORROBORATION OF TESTIMONY OF ACCOMPLICE.—Under section 1111 of the Penal Code, requiring that the testimony of an accomplice be corroborated, it is a sufficient compliance with the rule if the corroborative evidence showing the circumstances of the commission of the offense also tends to connect the defendant therewith.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Carter & Torchia, and E. E. Kirk, for Appellant.

U. S. Webb, Attorney-General, Robert M. Clarke, Deputy Attorney-General, and Roberto M. Camarillo, for Respondent.

CONREY, P. J.—The defendant appeals from the judgment and from an order denying his motion for a new trial. He and one Joe Barbera were jointly indicted and accused of the crime of burning and destroying property insured, for the purpose of defrauding the insurance company. The defendants were tried separately. The separate appeal of the defendant Barbera has been determined in accordance with an opinion of this court this day filed.

The defendant Turco claims that the court erred in permitting the district attorney to cross-examine him on matters which were not included in his direct examination. One Remeggio, a witness for the people, had testified that on the 7th or 8th of August, 1915, this defendant had given to Barbera the sum of \$2.50 with which to buy some demijohns of gasoline, and had given to the witness 50 cents to buy cotton, and that these materials were to be used in burning the building of Turco. The building was actually set on fire by Barbera at about 2 o'clock on the morning of Tuesday, August 10th. Turco had gone to San Diego on Sunday and did not return to the premises in question, in the city of Los Angeles, until Tuesday morning, a few hours after the fire had occurred. Remeggio had testified that he and Barbera had purchased the gasoline and the cotton, as requested by Turco, and that Turco had assisted in arranging these materials in preparation for the fire. Remeggio further testified to some conversations which he had with Turco in June and in July, looking toward the transaction which culminated on August 10th, and that he had assisted Turco in securing the insurance which was obtained by Turco on or about the second day of August, 1915.

As a witness on his own behalf, the defendant denied that he had given any money to Barbera or Remeggio; denied that he had anything to do with the preparation for the fire or any knowledge thereof; and denied a statement in the testimony of Remeggio to the effect that Turco had offered him a sum of money to burn the property in question. His counsel also asked him: "When you went to San Diego, did you know there was going to be any fire there that Sunday?" to

which he answered, "No, sir." The direct examination of defendant contained no direct reference to previous conversations with Remeggio (sometimes called Costa), except as to the particular matters above mentioned. On cross-examination the district attorney asked the defendant a series of questions covering the conversations to which Remeggio had testified, and also asked whether at certain dates in June and July he had made sundry other statements to Remeggio, which we need not repeat in detail, but which were on the subject of insuring the property and burning it or causing it to be burned.

The brief of counsel for appellant does not quote or cite any of the decisions declaring the law bearing upon the subject of cross-examination by the people of a defendant who has become a witness on his own behalf, but they simply rely upon section 1323 of the Penal Code, which reads as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding." The question presented relates to the permitted scope of cross-examination of the witness under a rule which limits such examination to "all matters about which he was examined in chief." Undoubtedly the cross-examination under such circumstances is not necessarily confined to the particular details expressly contained in the questions on direct examination. Where a fact denied by the defendant in his testimony covers the whole case or any branch of the case, the matter to be tested by the cross-examination is the truth or falsity of that denial, just the same as if it had been a denial of some more particular detail of fact. The people have the right on the cross-examination to draw out anything which will tend to contradict the evidence of the defendant adduced on his direct examination or weaken or modify its effect. (*People v. Rozelle*, 78 Cal. 84, 93, [20 Pac. 36]; *People v. Buckley*, 143 Cal. 375, 388, [77 Pac. 169]; *People v. Gallagher*, 100 Cal. 466, [35 Pac. 80]; *People v. Dole*, 122 Cal. 486, 491, [68 Am. St. Rep. 50, 55 Pac. 581].) In *People v. Gallagher*, 100 Cal. 466, [35 Pac. 80], the supreme court said: "The right of cross-examination affords the most effective mode of test-

ing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute. It was not the intention of the legislature to give to a defendant the opportunity of making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false." And in *People v. Dole*, 122 Cal. 486, [68 Am. St. Rep. 50, 55 Pac. 581]: "Any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses."

If on this cross-examination the defendant had admitted that he had previously made to Remeggio the statements called for by the questions to which these objections were and are directed, such answers would have had a tendency to discredit the testimony of the witness to which we have referred as given by him on his direct examination. These questions were so closely related to the testimony previously given by the witness, that they were fairly within the range and purpose of the "matters about which he was examined in chief."

In rebuttal the witness Remeggio was recalled and testified to several statements made by the defendant in conversation with him between June 9 and August 1, 1915, these being the conversations which had been denied by defendant and being in addition to the conversations to which Remeggio had testified originally as a witness for the people. It was objected that the questions were not rebuttal, and were leading and suggestive in that they asked whether certain quoted statements were made, instead of requiring the witness in his own language to state what was the conversation. Manifestly these questions were intended as impeachment of the defendant as a witness, and they were in the proper form of a question when asked for that purpose. Our decision above stated on the subject of cross-examination of the defendant is conclusive in favor of the propriety of these questions as asked in rebuttal.

Finally, it is insisted that the verdict was contrary to law, in that the conviction was had upon the testimony of an accomplice, without corroboration by other evidence tending to connect the defendant with the commission of the offense. Such corroboration is required by section 1111 of the Penal Code,

which further states that "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Of course it is a sufficient compliance with this rule if the corroborative evidence showing the circumstances of the commission of the offense also tends to connect the defendant therewith. This defendant admitted that he was present in the building in question until noon of Sunday, the eighth day of August; the defendant had taken out insurance on the property on the second day of August; and an examination, immediately after the fire, of his stock of goods in the storeroom occupied by him in the building which was set on fire, developed that a very large proportion of the shoe boxes, shirt boxes, etc., constituting the apparent stock of goods on his shelves, were empty boxes. The insurance agent testified that on August 1st, when negotiating for his insurance policy, the defendant stated that the stock of goods in his building consisted principally of "gent's furnishing goods and shoes," and that the stock of goods was worth one thousand six hundred dollars. The policy issued was for one thousand two hundred dollars on this stock and eight hundred dollars on the building and fixtures. The witness who examined the stock immediately after the fire qualified as an expert upon such values, and testified that he made an inventory of this stock of goods and valued it at \$476, figured on a retail basis. The defendant testified that when he closed his store at noon on Sunday, the eighth day of August, he left the store locked. Officers who examined the premises that Sunday night (warning having been secretly given them that the premises were to be burned) gave testimony showing that in the rear of the building they found a loose board of the wall which could be pushed aside so as to gain entrance; that in that way they entered and found in the storeroom certain jars of gasoline, cotton fuse and a candle, arranged in connection with each other as described by them. They had been watching the premises since 9 or 10 o'clock in the evening and made this entry at 2 o'clock in the morning. The fire did not take place until the next night.

Although it seems clear that the defendant Turco was absent from the city of Los Angeles from Sunday afternoon until Monday night, and although no witness other than Remeggio gave testimony directly connecting Turco with the preparations made for the fire, we are of opinion that the tes-

timony of the other witnesses to which we have just now referred shows circumstances not only tending to prove preparations made for the conflagration, but also tending to show the probability that the defendant had knowledge of those preparations. All that can be said in favor of the defendant's position in this regard is that the evidence leaves open a possibility that at some time between noon and 9 o'clock in the evening of Sunday, August 8th, some person other than the defendant, unknown to him, might have gained access to his storeroom and might have placed therein three demijohns containing fifteen gallons of gasoline with cotton arranged as a fuse and a candle ready to be lighted. But for us to say that the jury was unauthorized to treat such testimony as corroborative evidence tending to connect the defendant with the commission of the offense, would be to deny a legitimate and natural effect of the evidence.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1778. Second Appellate District.—February 9, 1916.]

THE PACIFIC COAST MAIL ORDER HOUSE (a Corporation), Respondent, v. E. R. STILLENS, Appellant.

ACTION ON PROMISSORY NOTE—PLEADING—AMOUNT DUE—CONCLUSION OF LAW.—In an action on a promissory note, where the answer admits the execution of the note, and alleges that the principal and interest remain wholly unpaid, but denies that the same is due and owing, or that any amount is due and owing, the admission is of the ultimate fact as to nonpayment, and the denial is a mere conclusion of law, which should be disregarded.

ID.—CROSS-COMPLAINT—ALLEGED FAILURE OF CONSIDERATION—INSUFFICIENT DEFENSE.—In such case, where there was attached to defendant's answer a set of allegations termed a cross-complaint, in which the execution of the notes sued on was admitted, but it was alleged that the same were given in exchange for certain shares of stock of the plaintiff corporation, and the further consideration that plaintiff would extend certain favors to defendant because of the purchase, and that plaintiff had agreed in consideration of the execution of the notes that a certain trade discount certificate should be issued, providing that for a period of ten years defendant should

be entitled to a discount from catalogue prices of merchandise purchased from plaintiff, and that, after the certificate had been issued, the privileges therein stated were repudiated by plaintiff corporation, which thereafter refused to allow the discounts, and that as a further consideration inducing the execution of the notes defendant was promised a catalogue showing prices of goods for sale by plaintiff, which catalogue was never furnished, and it was represented that plaintiff was a "strong corporation, and in eighteen months or thereabouts would pay dividends," which allegation was alleged to be false, and intended to deceive defendant, and was relied upon by and did deceive the latter, the alleged cross-complaint does not state a cause of action for damages, and is insufficient to support a judgment of rescission, it failing to allege the value of the stock or of the alleged privileges which were denied plaintiff, and there being no allegation of tender back of the stock, or vigilance shown by defendant asserting the right to rescind.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

Joseph Seymour, and J. F. Seymour, Jr., for Appellant.

Maltman & Clark, and James W. Glassford, for Respondent.

JAMES, J.—Appeal from a judgment entered in favor of the plaintiff, after answer filed by the defendant, the judgment being entered without trial as to the facts, but upon the application of plaintiff for decision in its favor upon the pleadings.

Plaintiff brought this action to recover a balance alleged to be unpaid on a promissory note executed by the defendant. The answer admitted the execution of the note and then proceeded as follows: "Admits that the principal and interest on said promissory note remains wholly unpaid. Denies that same is now due and owing, or that any amount is now due and owing." The admission contained in the first clause of the paragraph quoted was an admission of the ultimate fact as to the nonpayment of the note. The second clause in its terms of denial stated a mere conclusion of law which should be disregarded. (*Penrose v. Winter*, 135 Cal. 289, [67 Pac. 772], and cases therein cited.) Attached to defendant's answer was a set of allegations, which were termed a cross-complaint. In this portion of the answer the execution of the

promissory notes was again admitted, but it was alleged, in effect, that the same were given in exchange for one thousand two hundred shares of stock in the plaintiff corporation; and the further consideration that "plaintiff would extend certain favors to defendant herein because of such purchase." It was further alleged that the plaintiff had agreed "in case said execution of such notes above referred to by defendant was had," that a certain trade discount certificate should be issued which provided that for a period of ten years the defendant should be entitled to a five per cent discount from catalogue prices of merchandise purchased from the plaintiff. It was then alleged that, after the certificate had been issued, the privilege therein stated was repudiated by the plaintiff, and "that plaintiff ever since has refused and still refuses to allow defendant discounts as set forth in said certificate." In another allegation it is said that a further consideration "as an inducing cause to secure the two notes," was that the defendant was promised a catalogue showing prices of goods for sale by the plaintiff, which catalogue was never furnished. It was then alleged that an agent of the plaintiff, at the time of the execution of the notes, represented to defendant that the corporation was a "strong corporation, and within eighteen months or thereabouts would pay dividends." The allegation follows that the representations were false and untrue, and were intended to deceive the defendant, and were relied upon by him, and that they did deceive him and result in his damage. If it was the intention of appellant to state a cause of action for damages in his alleged cross-complaint, he failed to do so, for nowhere does it appear by any of his allegations as to what the value of the shares of stock received by him was, or what was the value of the alleged privileges which he claims to have been denied the right to enjoy. The allegations of the answer are wholly insufficient to state a cause of action for damages, and so also are they insufficient to support a judgment of rescission. Nowhere among the allegations is it in any wise alleged or shown that the defendant ever tendered back the certificates of stock received by him. For aught that appears, those shares may be of great value. And it is very correctly argued by the respondent that, even had the answer been complete in the essential last referred to, there is no showing of vigilance on the part of the defendant in asserting any right to rescind the contract, nor

any excuse for the long delay which had occurred at the time this action was commenced. The promissory note was dated in January, 1912. This action was commenced on March 30, 1914. By his own allegations defendant shows that whatever repudiation there was by the plaintiff of the alleged rights granted under the certificate of discount, that repudiation took place "immediately after the issuance of said certificate." The answer having admitted all of the material matters contained in the complaint, and having failed to state any legal defense thereto, the ruling of the trial judge granting the motion for judgment on the pleadings was correct.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 456. Second Appellate District.—February 9, 1916.]

THE PEOPLE, Respondent, v. JOHN STEPHENS, Appellant.

CRIMINAL LAW—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.—Under section 19 of article VI of the constitution, the credibility of witnesses and all questions of fact are matters exclusively for the determination of the jury, which is the exclusive judge of the credibility of witnesses and the effect and value of the evidence addressed to it.

ID.—ASSAULT WITH INTENT TO MURDER—DEFENSE OF ALIBI—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.—In a prosecution for the crime of assault with intent to commit murder, wherein the defense is based upon an *alibi* supported solely by the testimony of the defendant, it is for the jury to say whether such testimony should be believed, as against the testimony of witnesses whom it was sought to impeach.

ID.—EVIDENCE AGAINST DEFENDANT—SUFFICIENCY TO SUPPORT VERDICT—DECISION OF JURY—WHEN CONCLUSIVE.—If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone the appellate court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive.

ID.—RULINGS ON EVIDENCE—LACK OF PREJUDICE.—In this prosecution for the crime of assault with intent to murder, it is held that the

numerous assignments of error predicated upon rulings upon the admission and rejection of evidence related to trivial matters, and even though the rulings should be considered erroneous, no substantial rights of the defendant were prejudiced thereby.

ID.—PRESUMPTION AS TO INTENT—ERRONEOUS INSTRUCTION—CONVICTION OF LESSER OFFENSE—LACK OF PREJUDICE.—An instruction to the effect that, in the absence of evidence to the contrary, the “natural presumption must prevail” that one who assails another violently with a dangerous weapon, likely to kill, and which does in fact injure the party assailed, intended death or great bodily harm, is erroneous, as the existence of such an intent is a matter to be proved by the prosecution, but such instruction is not prejudicially erroneous where the defendant was convicted of a lesser offense.

ID.—CREDIBILITY OF WITNESSES—APPEAL.—It is not the function of appellate courts to determine the credibility of witnesses and weigh their testimony, nor is it the rule in this state that prejudice must be presumed upon the showing of error.

ID.—TAKING OF INSTRUCTIONS TO JURY-ROOM—LACK OF PREJUDICE.—The taking by the jury to the jury-room for reference, in considering their verdict, the instructions, which showed modifications of some of the requested instructions by erasures, is not prejudicial where there is nothing in the changes made in the instructions given which could possibly have affected the minds of the jurors in reaching a verdict.

APPEAL from a judgment of the Superior Court of Imperial County, and from an order denying a new trial. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

O. O. Willson, and W. F. Frazier, for Appellant.

U. S. Webb, Attorney-General, Robert M. Clarke, Deputy Attorney-General, and Roberto M. Camarillo, for Respondent.

SHAW, J.—Upon an information charging him with the crime of assault with intent to commit murder, defendant was convicted of the crime of assault with a deadly weapon.

He appeals from the judgment pronounced that he be punished by imprisonment in the state prison for the term of one year and required to pay a fine of one thousand dollars.

Numerous errors are assigned upon which appellant asks for a reversal, chief among which it is contended that there was no evidence to support the verdict. It appears that Mr.

Bosworth, the owner of an apricot orchard within the city limits of El Centro, having discovered that someone was stealing his fruit at night, employed one Bernard Fox to guard the orchard in an effort to apprehend the person engaged in pilfering. After dark on the evening of June 2d, Fox, who was armed with a shotgun, and while on duty as such guard, saw a person enter the orchard and proceed to pick fruit from the trees; whereupon he approached him and, while engaged in conversation, the party started to cross the fence inclosing the orchard, at which time Bosworth came upon the scene and, using a flashlight, looked at the person so apprehended by Fox. Bosworth accompanied Fox and his prisoner to a certain point on the boundary of the orchard, and instructed Fox to take the man to the jail, distant a half mile or more, and deliver him into custody of the officers. Fox proceeded with his prisoner, who walked some eight or ten feet in front of him, to a point described in the record as the corner of 6th and Olive streets, when the man so arrested turned and with a revolver shot Fox through the body. Defendant was arrested, charged with the offense, and upon trial based his defense upon an *alibi* supported solely by his own testimony. In addition to the fact that Bosworth, who had used the flashlight in looking at the man, positively identified defendant as the one found in the orchard and apprehended by Fox, the latter testified unequivocally that he was the man who, at 6th and Olive streets, shot him while proceeding on the way to the jail. Other than this direct testimony identifying defendant as the man who did the shooting was evidence of circumstances the existence of which, if by the jury deemed established, rendered it difficult, if not impossible, to reconcile the same upon any theory other than as pointing to defendant as the perpetrator of the crime. Had defendant offered no evidence in support of the alleged *alibi*, no question could arise as to the sufficiency of the evidence offered on behalf of the prosecution to convict. Since he offered evidence tending to support such defense, it became solely a question for the jury to weigh the same and determine the truth thereof. Under section 19 of article VI of the constitution, the credibility of witnesses and all questions of fact are matters exclusively for the determination of the jury, which, as we have repeatedly said, are the exclusive judges of the credibility of witnesses and the effect and value of the

evidence addressed to them. In *People v. Emerson*, 130 Cal. 562, [62 Pac. 1069], it is said: "If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." Conceding that defendant's own story exculpates him, nevertheless it was for the jury to say whether or not that story should be believed, as against the testimony of witnesses whom it was sought to impeach. (*People v. Rongo*, 169 Cal. 71, [145 Pac. 1017].) It is apparent from the verdict rendered that the jury did not believe the testimony of defendant. The fact, as stated, that the jury deliberated twenty-three hours, and that much evidence was introduced tending to show the good character of defendant (presumably the jury gave full consideration to such evidence), have no bearing upon the question presented. Many instances are on record where men of previous good character, as shown by the evidence, have been convicted of the commission of crimes where the jury have deliberated a much longer time.

Numerous assignments of error are predicated upon rulings of the court upon the admission and rejection of evidence, nearly all of which relate to trivial matters, and even should the rulings be considered erroneous, under no possible theory could the substantial rights of appellant have been prejudiced thereby. Illustrative of this is the fact that in searching defendant's room therefor, the officers making the arrest found a gun, the ownership of which was admitted by defendant. The testimony showed that when found all of the chambers were loaded, in which condition it was produced before the jury. The court ordered the cartridges to be removed therefrom, which being done, it was offered and received in evidence over defendant's objection that it was not in the condition in which it was when found. Another instance: A witness, testifying to the fact that she saw only one person pass along the sidewalk in front of her house at a given time, was asked: "If more than one passed, you would have seen him?" to which, the objection interposed being overruled, she answered: "I would think so. I was looking right out on the sidewalk to see who might come by." Several witnesses testified to the appearance of the chambers of

the gun when it was first found, such testimony being to the effect that all but one chamber were rusty and full of dust, the other showing it had been freshly used and emitted an odor of the explosion of fresh powder. Another witness, the city marshal, testified that he found the gun fully loaded, and came to the conclusion from examining the gun that it had been fired recently, one chamber had been fired. There was no objection to this question; whereupon he was asked upon what he based his conclusion, to which he replied, without objection: "Upon the appearance of the cylinder and the inside of the cylinder compared with the others." Whereupon a motion made to strike out the answer as being a conclusion, was denied. Conceding it to have been a conclusion, how could it—in view of the fact that the condition and appearance of the chambers as to dust and rust in all but one chamber was fully shown by other witnesses—have affected the verdict?

Appellant next insists that the court erred in the giving of instructions, and likewise erred in refusing instructions requested by defendant. The court instructed the jury that one must be presumed to intend to do that which he voluntarily and willfully does and intend the natural and probable consequences of his acts, and hence when one person assails another violently with a dangerous weapon, likely to kill, and which does in fact injure the party assailed, the natural presumption is that such assailant intended death or great bodily harm, and, in the absence of evidence to the contrary, such presumption must prevail. There was no error in so doing. The fact that the defense was based upon an *alibi* did not render the instruction improper, for the reason that, if the *alibi* was not sustained, the *corpus delicti* being established, the jury should in arriving at its verdict, if they found that defendant fired the shot, take into consideration the intent with which the act was committed. The court modified some of the instructions requested by defendant by erasing certain parts thereof. These instructions, it appears, were taken to the jury-room for reference in considering their verdict. Appellant claims that such act was prejudicial to his rights, since it acquainted the jury with the parts stricken out by the court. The contention is without merit, there being nothing in the changes made in the instructions given which could

possibly have affected the minds of the jurors in reaching a verdict. It is likewise insisted that the court erred in refusing to give certain instructions requested by defendant. The subject of the instruction so refused, however, appears to have been fully and fairly covered by instructions elsewhere given.

Counsel for appellant in presenting his case have apparently labored under the belief, not only that it is the function of this court on appeal to determine the credibility of witnesses and weigh their testimony, but also that the rule prevailing in some jurisdictions, namely, that prejudice must be presumed upon the showing of error, applies in this state. Such, however, is not the case. Prejudice to the substantial rights of one on trial does not necessarily follow from the mere commission of error. (Pen. Code, secs. 1404, 1258, and 960.) And to this must be added the effect of section 4½ of article VI of the constitution, which prohibits the court from reversing a judgment, etc., unless the error complained of has resulted in a miscarriage of justice. If attorneys representing defendants would bear these facts in mind, no doubt it would be the means of restricting appeals to cases possessing other merit than the stereotyped objection that the evidence (though shown to be sharply conflicting) is insufficient to justify the verdict; thereby saving both to themselves and the court much unnecessary labor.

The trial of the case was conducted in a manner calculated to protect defendant in every right to which he was justly entitled. The instructions given to the jury were clear, full, and absolutely fair to him, and the jury, notwithstanding the evidence was ample to show that defendant had made an assault with the intent to kill, considerably rendered a verdict for the lesser offense, accompanied with a recommendation for mercy, which action, upon the record, we conclude must have been due to the testimony of numerous witnesses to the previous good character of defendant, coupled with the trivial value of the subject for the taking of which he was apprehended by his victim.

The judgment and order appealed from are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 6, 1916, and the following opinion then rendered thereon:

ANGELLOTTI, C. J.—In denying the application for a hearing in this court after decision by the district court of appeal of the second appellate district, we deem it proper to say that we are not prepared to give our assent to the statement that there was no error in giving an instruction to the effect that *in the absence of evidence to the contrary*, the “natural presumption” that one who assails another violently with a dangerous weapon, likely to kill, and which does in fact injure the party assailed, intended death or great bodily harm *must prevail*. The charge here was assault with intent to commit murder, a charge as to which a specific intent to kill was an essential element. The existence of such intent was a matter to be proved by the prosecution, and while the jury were *at liberty to infer* such intent from such facts and circumstances as were stated in the instruction, it cannot be held to be a correct proposition of *law* to say substantially that they *must so infer*. But defendant was convicted of the lesser offense of assault with a deadly weapon, an offense involving no specific intent to kill or to do great bodily harm. (Pen. Code, sec. 245; *People v. Turner*, 65 Cal. 540, [4 Pac. 553]; *People v. Mize*, 80 Cal. 41, [22 Pac. 80].) Under these circumstances, it cannot be held that defendant was prejudiced by the instruction. (See *People v. Gordon*, 88 Cal. 422, [26 Pac. 502].)

Sloss, J., Melvin, J., Lawlor, J., and Shaw, J., concurred.

[Civ. No. 1728. Second Appellate District.—February 9, 1916.]

ISABELLE L. VAWTER, Appellant, v. F. T. PURDY et al.,
Respondents.

MUTUAL BENEFIT ASSOCIATION — BENEFICIARY — RIGHT OF INSURED TO CHANGE.—In the absence of restrictive provisions of the charter, by-laws, or rules under which the association operates, a member of a mutual benefit association has the right to revoke his designation of a beneficiary and substitute a different one.

ID.—RIGHT TO SELECT STRANGER AS BENEFICIARY.—Where a mutual benefit association is unincorporated and has no by-laws or set of rules beyond those which are set forth in the circular issued to invite members, which is accompanied by an application blank to be signed by the applicant, and the only qualification required is that the applicant shall be a member in good standing of a certain fraternal order, and shall not be over sixty years of age and in good health, the fund is designated as the "widow's benefit fund," and the circular informs the prospective members that the protection will be extended to either "wife, children, mother, sister, or friend," a member has the right to designate as the beneficiary one who does not stand in blood relationship to him.

ID.—LIFE INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—DIFFERENCE IN —RIGHT TO CHANGE BENEFICIARY.—While, under what may be termed ordinary life insurance policies, no right to change the beneficiary exists, the legal relation of a member of a mutual benefit association is different, and with respect to the benefits to accrue in the latter organization, the beneficiaries are possessed of but an expectancy, as against vested interests which accrue under the ordinary life policies.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis C. Legerton, Judge presiding.

The facts are stated in the opinion of the court.

E. J. Fleming, and B. F. Woodard, for Appellant.

Hahn & Hahn, and W. R. Hervey, for Respondent.

JAMES, J.—Plaintiff, the widow of E. J. Vawter, brought this action against defendants Purdy and Flint as trustees of a benefit fund which had been provided by an association of the nature of a fraternal organization. Upon the death of plaintiff's husband claim was made against the trustees for

the sum of \$758, to which it was alleged the plaintiff was entitled. Defendant Bassett claimed to be entitled to the same money by reason of having been substituted by the deceased Vawter in place of the original beneficiary, the plaintiff. Defendants Purdy and Flint answered, affirming that Vawter had requested them, as trustees, to pay the benefit fund to defendant Bassett, and averring that they were mere stakeholders, and held the money and would continue to hold the same to be paid pursuant to the judgment of the court. The findings of the court were against the plaintiff, and an affirmative judgment was entered in favor of the defendant Bassett as against the trustees mentioned. The appeal is taken from that judgment. This being an action at law, and the fund not being in court and physically subject to judicial disposition, we are at a loss to see by what authority an affirmative judgment was entered in favor of one defendant as against other defendants, where no cross-complaint was filed. However, if it is to be determined that the judgment against the plaintiff herein was supported by the evidence, then, as the trustee defendants are not complaining, it will be without the province of this court to make any order affecting that judgment. And we think that the judgment determining that the plaintiff was not entitled to collect the money should be sustained.

Under the facts as stipulated it appears that a mutual benefit association was organized for the purpose of providing a death benefit fund which would be paid to a beneficiary selected by a member. The total sum required to be paid in the first instance by each person, in order to secure membership, was \$2.20. Thereafter, upon the death of any member, an assessment of \$1.10 would be levied against each member of the association, and all of the fund so raised, except for a deduction of ten cents for each member, would be the amount paid to the beneficiary. Therefore, it appears that the amount of the benefit would be variable, depending altogether on the total of the membership at the time of the death of a member. It is not shown that the organization was incorporated, or that it had any by-laws or set of rules beyond those which were set forth in the circular issued to invite members and which was accompanied by an application blank to be signed by the applicant. The only qualification required was that the applicant should be a member in good

standing of a certain fraternal order, and that he should be not over sixty years of age and in good general health. While the fund was designated as the "widow's benefit fund," the circular issued informed the prospective members that the protection would be extended to either "wife, children, mother, sister, or friend." The word "friend," of course, quite plainly was intended to include any person whatsoever, in addition to those mentioned as being in certain relationship with the member. The deceased, E. J. Vawter, at the time he became a member of the association, designated his wife, the plaintiff herein, as the person who should receive the benefit in the event of his death. Thereafter he notified the association of a change of beneficiary, then designating E. J. Vawter, Jr., as trustee for two persons named. About two years later he wrote to the secretary of the association as follows: "I now desire to change the beneficiary named therein and to make my friend, Mary C. Bassett, Ocean Park, California, the person to whom the payment shall be made at my decease. In no case is payment to be made to Isabelle L. Vawter, the beneficiary heretofore named in my application No. 653." In response to this letter the secretary wrote to Vawter, informing him that his instructions with regard to the last change of beneficiary had been complied with. The question involved, and the only question entitled to consideration, is as to whether Vawter had the right to make the change of a beneficiary so as to give to the defendant Bassett the death benefits. As to this question, notwithstanding the argument for appellant to the contrary, we think that the authorities preponderate to the effect that a member of such an association as that described has the right, in the absence of restrictive provisions of the charter, by-laws, or rules under which the association operates, to revoke his designation of a beneficiary and substitute a different one. It would seem to serve no good purpose to multiply citation of authorities to that point. The courts sustaining the general rule have held that, while under what may be termed ordinary life insurance policies, no right to change the beneficiary exists, the legal relation of a member of a mutual benefit association is different, and that with respect to the benefits to accrue in the latter organizations the beneficiaries are possessed of but an expectancy, as against a vested interest which accrues under the ordinary life policies. The law is stated and a

large number of authorities are collected by the two text-writers whose works we have examined: Bacon on Benefit Societies and Life Insurance, third edition, section 306, where the writer says: "The accepted doctrine, now generally approved by all the authorities, is that the beneficiary may be changed if the laws of the order so provide, or if, when such transfer is not prohibited by the laws of the society, the certificate or policy has not been delivered to the beneficiary." In Niblack on Benefit Societies and Accident Insurance, at section 212, page 405, this statement is made: "So far as outward appearances may indicate, there is little difference between an ordinary policy of life insurance and a contract of mutual benefit insurance. But it has been held with substantial unanimity, whenever the question has arisen, that, in mutual benefit societies, the contract of insurance is between the society and the member, that the beneficiary acquires no vested right in the benefit fund which is to accrue upon the death of the member, until the death takes place, and that, during his life, therefore, the member may change his beneficiary without other limitations or restrictions than such as are imposed by the organic law, the articles of incorporation, the by-laws, or the certificates of the society." The authorities cited in the latter text-book under the section to which we have referred are in the main those which find place in the briefs of counsel. Those authorities mentioned below, which are cited to the additional point raised by counsel, are in line with the general current of authority.

The point is made that Mary C. Bassett, not sustaining any blood relationship toward the deceased, was not eligible to be named as a beneficiary by him. This is not a case illustrating the law that a person, in order to take out insurance upon the life of another, must possess what is called an "insurable interest" in the life of the person insured. The facts shown here were that Vawter made application for the insurance in his own behalf and paid whatever sums of money were required to be paid in discharge of his obligations as a member of the fund. The contract expressly permitted him to select as a beneficiary persons other than those standing in blood relationship with him. In the absence of any statute or contract restricting the right of the insured as to the classes of persons from whom he may select his beneficiary, the utmost freedom of choice in that regard exists. (*Titsworth v. Tits-*

worth, 40 Kan. 571, [20 Pac. 213]; *Overbeck v. Overbeck*, 155 Pa. St. 5, [25 Atl. 646]; *Sabin v. Phinney*, 134 N. Y. 423, [30 Am. St. Rep. 681, 31 N. E. 1087].)

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 337. Third Appellate District.—February 9, 1916.]

THE PEOPLE, Respondent, v. DENTON CHOBER (True Name Antonio Chavez), Appellant.

CRIMINAL LAW—AMENDMENT OF INFORMATION AFTER PLEA—CONFORMANCE TO COMMITMENT—STATEMENT OF LESSER OFFENSE—LACK OF PREJUDICE.—In a criminal action it is not prejudicial to the substantial rights of the defendant to allow the district attorney, after the defendant has entered his plea of not guilty to the information, to amend the information to make it conform to the commitment by the magistrate, where the crime charged under the amendment is included within the crime charged in the original information.

ID.—AMENDMENT OF INFORMATION AFTER PLEA—MOTION TO SET ASIDE UNAUTHORIZED.—A new or amended information cannot be set aside on the ground that an information cannot be amended at any time after the defendant has pleaded thereto, as such ground is not among those enumerated in section 995 of the Penal Code, which expressly prescribes and limits the grounds of such a motion.

ID.—VERDICT UPON CONFLICTING EVIDENCE—RULE.—If the evidence which bears against a defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone the appellate court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive.

ID.—INSTRUCTIONS—SELF-DEFENSE.—It is not error to refuse to give to the jury a number of instructions proposed by the defendant containing a statement of the law of self-defense, where the court gave in substance and effect all that was contained in such proposed instructions.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was convicted in the superior court of the county of San Joaquin of the crime of an assault with a deadly weapon. He appeals from the judgment and the order denying his motion for a new trial.

The first assignment of error involves the action of the court in allowing the district attorney to amend the information after the defendant had entered a plea of not guilty to the information as originally filed.

The reason for the allowance of the amendment was that the original information did not conform to the commitment by the magistrate, in that it charged a different offense from that for which the defendant was committed.

It appears that the defendant was charged in the complaint filed with the magistrate with the crime of assault to commit murder. The commitment recited that the defendant was charged with the crime of assault to commit murder, and that it appeared that the "offense above mentioned has been committed, to wit, assault with a deadly weapon," etc. Upon this commitment, the district attorney filed an information charging the defendant with the crime of assault with the intent to commit murder. After his arraignment upon and plea to the information as so filed, and on the day upon which the case was called for trial, which was several months after his arraignment and plea, the district attorney, calling the court's attention to the commitment and declaring that he construed it as an order holding the defendant to trial for the lesser offense of assault with a deadly weapon, asked leave to amend the information so that it would charge the latter offense. The court, over objection by counsel for the defendant, granted the motion, and the information was amended accordingly. The defendant's attorney thereafter moved to set aside the information as so amended on the ground that an information cannot be amended after the defendant has entered his plea thereto.

The commitment is somewhat ambiguous as to the crime for which the magistrate intended to hold the defendant to trial, but we agree with the district attorney that, properly

construed, the commitment was for an assault with a deadly weapon.

Section 997 of the Penal Code authorizes the court to order a new information to be filed in lieu of one previously filed where the latter or the original information is set aside on any of the grounds specified in section 995 of said code. This section (997) applies where, before the filing of the original information, the defendant had not been legally committed by a magistrate, and this ground is available and the information will be set aside thereon, if the facts warrant it, and a new information substituted therefor, if the court so orders, when the original information charges an offense different from that for which the accused has been committed. (*People v. Clayberg*, 26 Cal. App. 614, [147 Pac. 994], and cases named therein.)

Section 1008 of the Penal Code authorizes the court to allow the district attorney to amend either an indictment or an information under certain qualifications. That section, in so far as it is of interest to the present discussion, reads as follows: "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. . . . "

From the nature of the order allowing the district attorney to change the charge against the defendant, it is obvious that the court assumed to act under section 1008, and so intended that the effect of its order should merely be to grant to the prosecuting attorney leave to amend the original information. But we do not conceive it to be important here to consider whether the act of the district attorney in changing, by permission of the court, the offense charged in the information as it was originally filed constituted, in legal effect, an amendment of the original information or, viewing the order as having the effect of setting aside the original information, the filing of a new information in lieu of the original; for, in either case, the objection of the defendant to the proceeding

cannot be sustained upon any view of which it may be susceptible.

Assuming that the amendment of the information and not the filing of a new one was the proper course (and a forceful argument might be advanced that it was properly a case for an amendment, inasmuch as the lesser crime to which the charge was reduced is necessarily included in the crime originally charged), then, in that case, the ground upon which the defendant based his motion would not in any event be tenable. Section 1008, as will be noted, expressly provides that *an information may be amended at any time after a plea has been entered thereto by the defendant*, in the discretion of the court, and the only question which could arise in such case is whether the allowance of the amendment, after the plea, constituted an abuse of discretion or, which would be equivalent thereto, resulted in prejudice to the substantial rights of the defendant, and that question cannot be raised by such a motion. But, assuming that that question is now properly before us, we cannot perceive, from the circumstances of the case, wherein the substantial rights of the defendant could have been prejudiced in the remotest degree by the action of the court in allowing the amendment. The crime charged under the amendment is, as before suggested, and as is manifest, included within the crime of assault to commit murder, which, as seen, was the original charge upon which the defendant was informed against. All the elements of the original charge, except that of an intent to take life, are involved in the charge preferred under the amendment. The evidence taken and heard at the preliminary examination necessarily showed that the crime of assault with a deadly weapon had been committed, even if it went further and disclosed that such assault was made with the intent to commit murder. The witnesses, both those for the people and those for the defendant, must have been the same in either case. Their testimony, except that of the physician who professionally attended the prosecuting witness, necessarily bore upon the circumstances under which the assault was made. Had the charge remained as originally made, the element of intent to murder, if really in the case, must necessarily have been shown by or inferred from the circumstances of the assault as detailed by these witnesses, and, as stated, these same circumstances necessarily constituted the subject of their

testimony in the trial of the lesser offense charged. The defendant was, therefore, as well prepared to proceed with the trial of the case under the purported amended information as he would have been had the trial been had upon the original information.

But let us look at the situation from another viewpoint. Suppose that the changing of the offense as it was originally charged amounted in legal effect to the filing of another information charging the offense for which the defendant had been committed, but which offense was of an entirely different nature from the one originally charged, and the later information had been filed after the time within which it should have been filed after the accused had been committed. In that case the defendant should have moved and, in the absence of a showing of good cause for deferring the filing of said information after the time prescribed, the court would have been required, to dismiss the same. (Pen. Code, sec. 1382.) Or, granting that the purported amendment, in actual legal effect, involved the charging of an offense not shown by the evidence taken at the preliminary examination, then the course which the law points out and which the defendant should have pursued was to make a motion to set aside the information on the ground that, before the filing thereof, he had not been legally committed by a magistrate. (Pen. Code, sec. 995.) But the ground upon which the defendant moved to set aside the new or amended information, to wit, that an information cannot be amended at any time after the defendant has pleaded thereto, is not among those enumerated in section 995 of the Penal Code, which expressly prescribes and, by consequence, necessarily limits the grounds of such a motion, as follows: "1. That before the filing thereof [the information] the defendant had not been legally committed by a magistrate; 2. That it [the information] was not subscribed by the district attorney of the county."

From the foregoing views, it follows that the objection to the action of the court in the respect here considered cannot, as before stated, be sustained upon any theory upon which it may be considered.

It is next contended that the evidence is insufficient to support the verdict. We cannot say so.

The assault took place at Lathrop, in San Joaquin County, on the afternoon of the thirtieth day of May, 1915. The per-

son assaulted was one Jactano Decicco. The latter's brother owned a house in Lathrop. It was occupied by a tenant and used as a rooming and boarding house. At this house the defendant lived. It appears from the testimony of Decicco that, on the day the assault was committed, he went to his brother's house to procure some garden hose. When he was approaching and within sight of the house he saw the defendant standing in the yard, which was inclosed by a fence. Upon reaching the gate opening into the yard, and just as he was about to enter the yard through the gate, the defendant, addressing him, asked him what he wanted, to which question Decicco replied that he wanted to get the hose or a mower (the testimony is somewhat confusing or inconsistent as to the article Decicco wanted), and thereupon the defendant said to Decicco, "You are not wanted here." Some words were then exchanged between the two, Decicco saying, "All right," and turned to leave the premises. Decicco observed, while they were quarreling, that the defendant had a knife in his hand. When Decicco started to leave the place, the defendant left the yard and followed and overtook him and thrust a knife blade into the middle of Decicco's back. The wound thus produced was near the spine, and the doctor, who was immediately called to attend Decicco, said that it was at least an inch deep, an inch or an inch and a half wide, and bled profusely, and caused Decicco to be confined to his bed for some days.

The witness, Miss Amy Taylor, testified that, as she was walking along the street near where the trouble occurred, she was attracted by loud talking and, turning to the direction from which the sound of the voices came, saw the defendant and Decicco, the former on the inside and the latter on the outside of the yard of the house above referred to. They were talking in a foreign language and apparently quarreling. Later she again turned to see if they were still quarreling, and at this time they were both on the outside of the yard and on the ground, engaged in a struggle with each other. Finally, she saw the defendant thrust the knife into the body of Decicco.

Several other witnesses saw Decicco after the encounter lying on the ground on the outside of the yard. There is also testimony that, immediately after stabbing Decicco, the

defendant left the scene, going away from the house where he roomed and boarded.

The constable at Lathrop, having been informed of the trouble and the assault upon Decicco, started in quest of the defendant, and found him lying in a manger in a barn in Lathrop, his entire body being covered with hay.

The defendant claimed self-defense, and told an entirely different story. He testified that the difficulty occurred in the room occupied by him in the rooming and boarding house mentioned; that Decicco had invited him to drink some wine, which he refused; that Decicco then charged him with a gallon of wine for which he had already paid; that a quarrel over that matter ensued and that Decicco called him a "s—n of a b—h" three different times, grabbed hold of and "embraced" him, and he fell to the floor; that thereupon Decicco struck him four times, and was in the act of getting hold of a piece of iron lying on the floor hard by, when, believing himself to be in danger of losing his life or suffering serious bodily injury at the hands of his assailant, he drew a knife from his pocket and thrust the blade into the back of Decicco.

Thus it is readily to be seen that there is a pronounced conflict in the evidence upon the question whether, in assaulting the prosecuting witness, the defendant acted in necessary self-defense. There were also shown some inconsistent statements made by the prosecuting witness as to some of the circumstances leading to the trouble between the two men. These contradictory statements, however, were, in the main, as to matters which were of little consequence. For illustration, it was shown that the prosecuting witness stated at the preliminary hearing of the charge that his purpose in going to the house where or near which the assault took place was to procure a mower, whereas, at the trial, he said that his object in going there was to get some hose. But, whatever might have been the nature of the inconsistent statements made by the witnesses, it was for the jury and not for this court to consider them in determining how far, if at all, they discredited the witnesses whose testimony was so characterized, and thus to ascertain and admeasure the weight to which such testimony was entitled as in proof of the defendant's guilt. And likewise, as has so often been declared in the cases, the decision of controverted questions of fact upon

conflicting evidence is wholly a function of the jury and not of reviewing courts. As was well said in the case of the *People v. Emerson*, 130 Cal. 563, [62 Pac. 1069]: "If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive."

The record clearly discloses evidence sufficient to support the verdict.

The next assignment involves an attack upon the action of the court in refusing to adopt and read to the jury a number of instructions proposed by the defendant and which contained a statement of the law of self-defense. The court in plain language instructed the jury at length and correctly upon the law of self-defense, and in substance and effect stated all that was contained in the instructions proposed by the defendant. A trial court is not required repeatedly to state the same principle of law to a jury; hence the rejection of the defendant's instructions upon self-defense cannot stand as the predicate for a reversal.

We have found no error in the record violative of the substantial rights of the defendant, and the judgment and the order appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1437. Third Appellate District.—February 10, 1916.]

E. J. WHITE, Respondent, v. JENNIE J. MATHEWS, as Auditor, etc., Appellant.

MANDAMUS—WHEN ISSUABLE.—A writ of mandate will not issue if there is a plain, speedy, and adequate remedy at law.

ID. — COUNTIES — LIABILITY FOR CLAIMS — MEASURE OF AUTHORITY OF TRIBUNAL.—The statute only must be looked to, to ascertain the extent of the authority of any tribunal to determine and fix the liability of a county for any claims that may be presented against it.

ID.—EXPERTING OF COUNTY BOOKS—PAYMENT FOR SERVICES—CONSTRUCTION OF SECTION 928, PENAL CODE—SUPERIOR COURT WITHOUT JURISDICTION.—The superior court has no power, under section 928 of the Penal Code, to issue an order directing a county auditor to draw his warrant in payment of the services of an expert employed by the grand jury to examine the books of the officers of the county, as its jurisdiction under such section is limited to the approval of the employment of the expert, and *mandamus* will not lie to compel the issuance of such a warrant.

ID.—APPROVAL OF CLAIM—DUTY OF BOARD OF SUPERVISORS.—A claim for services for experting county books must be settled and allowed, as other claims, by the board of supervisors, as the only power of the grand jury is to enter into an agreement for the employment at an agreed compensation *per diem*, and the only power of the court is to approve such employment.

'APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Hale McCowen, for Appellant.

Charles Kasch, for Respondent.

BURNETT, J.—This was a petition for a writ of mandate to require the auditor to draw a warrant in favor of plaintiff for his services in experting the books of the county under employment by the grand jury. After the preliminary averments, the complaint sets forth that the grand jury, in pursuance of section 928 of the Penal Code, "deemed it necessary to secure the services of an expert to examine the books, records, and accounts of all the officers of the county and especially those pertaining to revenue for a period of six months ending December 31, 1914, and that the employment of said expert for said purpose was approved by the superior court in and for the county of Mendocino, it being provided that said expert should be employed for a period not to exceed twenty-five days at a compensation of ten dollars per day." It further appears that plaintiff performed said services beginning on February 3 and completing the work on March 24, 1915; that he made his report to said grand jury and presented to said body a statement showing the amount due him, to wit, the sum of \$250; that thereafter this statement was

presented to the judge of the superior court of said county and it was duly approved by him; that thereafter said judge made an order directing defendant as auditor to draw her warrant on the treasurer of said county in favor of plaintiff for said sum, but that she refused, and still refuses, to do so. A general demurrer was interposed by the district attorney of the county representing the auditor, but this was overruled, and judgment directed to be entered requiring said auditor to draw said warrant, and from this judgment the appeal is taken.

There is no difference between counsel as to the principle of law involved, the controversy being rather as to the construction of said section 928 of the Penal Code.

It is not disputed that the writ of mandate should not issue if there is a plain, speedy, and adequate remedy at law, and that we must look only to the statute to ascertain the extent of the authority of any tribunal to determine and fix the liability of the county for any claims that may be presented. The duty of the auditor is prescribed in section 4091 of the Political Code as follows: "The auditor must issue warrants as provided in section four thousand and seventy-six, on the treasurer, in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county which have been legally examined, allowed and ordered paid by the board of supervisors. The auditor must also issue warrants on the treasurer for all debts and demands against the county, when the amounts are fixed by law, *or are authorized by law to be allowed by some person or tribunal other than the board of supervisors.*"

There can be no pretense that the present case falls within the foregoing enumeration unless it be included in the class of claims which we have italicized. This is, indeed, conceded, and respondent declares that "the only question in the appeal of this case is whether or not the judge of the superior court has a right to issue an order directing the auditor to draw a warrant in payment of the services of an expert employed by the grand jury. If the judge has such authority, so far as the auditor is concerned the claim is no different from a judgment. If the judge has such authority, the claim has regularly been presented, audited, and allowed just as a claim for witness fees, reporter's fees, and for furnishing the courtroom are allowed. If it has been duly presented, allowed,

and ordered paid, the action of the judge, in the absence of fraud, is conclusive, and the auditor cannot lawfully refuse to draw his warrant therefor." He further insists that such authority for the judge to audit the claim and make the order for its payment is found in said section 928 of the Penal Code.

Before analyzing said section we may examine the decisions cited by respondent in support of his contention.

The first of these is *Ex parte Reis*, 64 Cal. 233, [30 Pac. 806]. Therein it was held that the superior courts in the city and county of San Francisco had the power to fix and order paid the compensation of phonographic reporters in criminal cases, and it was the duty of the treasurer of said city and county to pay the same upon the order of the court. It is apparent that such authority was clearly conferred upon said courts, for the law provided that "the compensation of the reporter must be *fixed by the court* and paid out of the treasury of the county in which the case is tried, *upon the order of the court.*" There was no room for difference of opinion as to the construction of the law, the only ground for debate being as to whether the statute was in force and as to the constitutional authority of the legislature to confer such power upon the court.

In *Boys and Girls Aid Soc. v. Reis*, 71 Cal. 627, [12 Pac. 796], it was held that an order of the police court of the city and county of San Francisco for the payment out of the city and county treasury of the expenses for the maintenance of a minor convicted of a misdemeanor and committed to the custody of the officers of a nonsectarian charitable corporation is not an exercise of the right of taxation without representation, and that it was the duty of the treasurer to comply with such order, notwithstanding the demand had not been first approved by the board of supervisors. But the law therein explicitly provided that "such court may further, in its discretion, *direct the payment* of the expenses of the maintenance of such minor during such period of two months, not to exceed in the aggregate the sum of twenty-five dollars," etc., and the court said: "To the judge of the proper court the statute commits the discretion of making the orders for such payments; where such a discretion is by law conferred upon a specific officer, such officer must exercise that discretion personally. . . . And when properly exercised the board of

supervisors is not required to supervise the action of the court."

McAllister v. Hamlin, 83 Cal. 361, [23 Pac. 357], involved the application of subdivision 6 of section 869 of the Penal Code, providing that: "The reporter's compensation shall be fixed by the magistrate before whom the examination is had, and shall not exceed that now allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county, or the city and county, in which the examination is had, on the certificate and order of the said magistrate." Like the cases hereinbefore considered, the intention of the legislature was plain. The statute clearly authorized the magistrate to fix the compensation and audit the claim of the reporter, and it was properly said: "The legislature did not intend, when it passed the section of the Penal Code, that notwithstanding it authorized the *fixing* by the exercise of judicial discretion by the magistrate of the reporter's compensation, nevertheless it was left with the board of supervisors, in their discretion as a superior supervising body, to *unfix* what had been confided by the legislature to the judicial tribunal. . . . The demands and accounts to be allowed by the board of supervisors are not those which the legislature has expressly authorized the judicial branch of the government to certify to and order paid out of the treasury of the county, or that of the city and county. No such supervisory power over the courts of the state was ever intended to be lodged with the board of supervisors by the County Government Act."

In *Ex parte Widber*, 91 Cal. 367, [27 Pac. 733], the supreme court had under review section 144 of the Code of Civil Procedure, providing that if the board of supervisors neglect to provide the same, the superior court or judge thereof might direct the sheriff to secure suitable rooms, etc., for the court, and that "the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof." It was correctly said by the supreme court: "It is not necessary that these demands should be audited by the board of supervisors; for the legislature in the section of the code itself provided that the judge should be the auditing officer." The court also held that "the power of the court is limited and measured by the terms of the section," and that it had no

authority to direct the imprisonment for contempt of the treasurer who refused to obey the order of the court directing him to pay the money out of the treasury, since there was nothing in the provisions of the code giving the court any such power, "and it certainly had not the inherent power to make the order, for such power was not a necessary incident to the court in order that its previous acts might fully and truly accomplish the results intended and desired. . . . Under the provisions of the code the court does not even audit the demand; that act is performed by the judge, and when performed, the power given under this section is exhausted."

This case, however, is strikingly different from those hereinbefore cited. We look in vain in said section 928 for any provision authorizing the court or the judge to audit the demand, to certify to its correctness, to make an order for its payment, or in fact to make any order whatever in the premises after the services are performed. We may quote the portion of said section relating to the subject as follows: "It shall be the duty of the grand jury annually to make a careful and complete examination of the books, records, and accounts of all the officers of the county, and especially those pertaining to the revenue, and report as to the facts they have found, with such recommendations as they may deem proper and fit; and if, in their judgment, the services of an expert are necessary, they shall have power to employ one, at an agreed compensation, not to exceed ten dollars a day, to be first approved by the court. . . . Such compensation of expert and assistants to be payable as other county charges."

It is thus to be seen that the only thing in the matter concerning which the court acts is the *employment* of the expert. The court must approve the employment, and this before the grand jury employs him. Said body has no power to employ him without said approval. There is not a syllable as to any further action by the court. Of course, any order of approval of the employment made by the court before the services are performed cannot amount to an audit or certification of the claim. The claim against the county does not mature until the work is done, and then it is to be paid "as other county charges." That can mean nothing else than that it stands upon the same footing as ordinary claims against the county. The approval of the court gives validity to the contract, but

the power to fix the amount due after the services are performed does not follow from the exercise of the authority to permit a legal charge to be incurred against the county. As stated by appellant, "the sheriff and district attorney each has the right to incur expenses legally chargeable against the county for the detection of crime, yet no one would argue that either of those officials has the power to direct the auditor to draw a warrant for those expenses." The matter of the expenses of the district attorney was, indeed, considered by the supreme court in *County of Yolo v. Joyce*, 156 Cal. 429, [105 Pac. 125]. Therein is quoted section 228 of the County Government Act of 1898 (Stats. 1897, p. 575), as follows: "The following are county charges: . . . The traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases and in civil actions and proceedings and all other matters in which the county is interested," and it was held that this must be considered in connection with subdivision 1 of section 25 of the County Government Act, providing that county charges "are to be paid out of the county funds under a claim presented to and allowed by the board of supervisors."

It is, no doubt, the declared policy of the law to confide to the board of supervisors the general supervision and control of the financial affairs of the county. It is made their duty "to examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and such demands as are authorized by law to be allowed by some other person or tribunal, and order warrants to be drawn on the county treasurer therefor." (Pol. Code, sec. 4041, subd. 12.)

Here, as we have seen, there is no other tribunal authorized to allow the claim. When the employment is approved by the court and the services are performed, they become a legal charge against the county, but, there being no special mode provided for the payment of said claim, it is "to be submitted to the board of supervisors as other claims against the county are submitted." (*Murphy v. Madden*, 130 Cal. 674, [63 Pac. 80].)

The propriety of submitting said claim to some tribunal to be audited and allowed must be apparent. As we have seen,

the only authority committed to the court is to approve the employment, and it may be said that the only power of the grand jury is to enter into an agreement for the employment at an agreed compensation *per diem*. In other words, the court and grand jury can authorize the employment of an expert and fix his daily compensation, but their power extends no further. If it had been the intention of the legislature to clothe the court or the grand jury with the authority to audit the demand and direct its payment after the services had been performed, it must be presumed apt language for that purpose would have been used.

In conclusion, we may say that there should be no difficulty in securing favorable action by the board of supervisors if the work was actually performed. There seems to be time yet for petitioner to present his claim as suggested, and we feel satisfied that such is the course to pursue.

The judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 6, 1916.

[Civ. No. 1472. Third Appellate District.—February 10, 1916.]

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), Respondent, v. ENSIGN-BAKER REFINING COMPANY (a Corporation), Appellant.

ACTION ON PROMISSORY NOTE—APPEAL FROM JUDGMENT—JUDGMENT-ROLL—DEFENSE OF ACTION PENDING NOT REVIEWABLE.—Upon an appeal taken upon the judgment-roll alone in an action upon a promissory note, the defense that the same cause of action was pending in another action at the time such judgment was entered cannot be considered, for there is nothing in the record to show that such defense was established.

ID.—PLEADING—USE OF MONEY FOR BENEFIT OF DEFENDANT CORPORATION—SUFFICIENCY OF COMPLAINT.—Where it appears from the allegations of the complaint that the transaction was between two corporations in their corporate capacity, and that the plaintiff advanced

the money to the defendant, which was the "value received" by the latter for executing the note, the complaint is not subject to demurrer on the ground that it does not state that any money received in exchange for the note was used for the benefit of the defendant corporation.

ID.—AUTHORITY TO EXECUTE CORPORATION NOTE — PRESUMPTION. — The complaint is not subject to demurrer for failure to allege that the president and secretary of the corporation maker were duly authorized to execute the note, as such authority will be presumed.

ID.—DESIGNATION OF CORPORATE CAPACITY—ABBREVIATIONS.—The use of the abbreviations "Pres." and "Secy.," in designating the official capacities in which the president and secretary of the corporation maker signed the note, is sufficient to show official capacity.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Daniel O'Connell, and L. Horwitz, for Appellant.

Heller, Powers & Ehrman, and James L. Robison, for Respondent.

CHIPMAN, P. J.—This is an action upon a promissory note. Plaintiff had judgment for twelve thousand five hundred dollars, principal, and four hundred and seventy dollars and eighty-three cents, simple interest, computed at the rate of six per cent per annum. Defendant appeals from the judgment. It is alleged in the complaint that both plaintiff and defendant are corporations organized under the laws of California. The third paragraph of the complaint reads as follows:

"On or about December 15, 1910, at the city and county of San Francisco, state of California, the defendant for value received, to-wit, the sum of twenty thousand (20,000) dollars then and there loaned and advanced by the plaintiff to the defendant, made, executed and delivered to the plaintiff its promissory note, of which the following is a copy:

" '\$20000.00 San Francisco, Cal., December 15, 1910.

" 'One day after date, without grace, for value received, Ensign-Baker Refining Company (a corporation) promises to pay to the order of the Union Trust Company of San Fran-

cisco (a corporation) at its office in this city, the sum of Twenty Thousand Dollars, in United States Gold Coin, of the present standard of weight and fineness, with interest thereon in like Gold Coin, from date until paid, at the rate of six per cent per annum, payable monthly, and if not so paid, to compound and become a part of the principal, and bear interest thereafter at the same rate.

“ ‘ENSIGN-BAKER REFINING Co.

“ ‘By E. J. ENSIGN, Pres.

“ ‘By L. E. ENSIGN, Secy.’ ”

It is further alleged that the sum of seven thousand five hundred dollars and no more has been paid on account of the principal of said promissory note and interest to and including June 30, 1913, and no more, leaving a balance unpaid upon the principal of twelve thousand five hundred dollars and interest thereon from June 30, 1913, “at the rate of six per cent per annum, payable monthly and compounded,” no part of which said principal sum of twelve thousand five hundred dollars and no part of any interest accruing since said June 30, 1913, has been paid. The complaint is verified.

Defendant interposed a general demurrer on the ground that the complaint fails to state whether or not said president and secretary were authorized by said corporation to execute and deliver said promissory note; that the complaint does not state that any money received in exchange for said promissory note was used for the benefit of said corporation; that the complaint is uncertain, and that it does not set forth any authorization of said president and secretary to make, execute, or deliver said promissory note. The demurrer was overruled and defendant answered.

The answer admits the corporate capacity of plaintiff and defendant; admits the execution and delivery of said promissory note as alleged in paragraph III of the complaint, but “denies that any more than seven thousand five hundred dollars of principal, and interest at the rate of six per cent and no more is due upon said note,” and denies that there is any compound interest due.

As a further answer defendant alleges that another action was commenced by plaintiff upon this same promissory note prior to the commencement of this present action, in which certain named persons, other than defendant, are defendants; that said action went to trial and judgment, from which an

appeal has been taken to the supreme court and execution was stayed by proper undertaking, and defendant alleges that said judgment is a bar to the further prosecution of this action. The judgment from which the present appeal was taken recites that the cause came on regularly for trial on February 16, 1914. "The defendant did not appear and was not present either in person or by attorney or counsel. Thereupon proof was made to the satisfaction of the court that more than five days' notice of trial and that the action would be tried on this day has been given to the defendant and its attorney, Daniel O'Connell, Esq. Thereupon the action was tried upon the issues joined by the complaint and answer on file herein, and the evidence oral and documentary was taken on behalf of plaintiff in support of the allegations in the complaint; and the plaintiff by its attorneys having waived its claim of compound interest and consented that interest might be computed at simple interest at the rate of six per cent per annum, thereupon the court found that the plaintiff was entitled to recover," etc. The judgment also recited that findings of fact and conclusions of law were waived by defendant's failure to appear or be represented at the trial.

The appeal necessarily is on the judgment-roll alone.

The defense that the same cause of action was pending in another action at the time this judgment was entered cannot be considered, for there is nothing in the record to show that such defense was established. The only question raised by the demurrer that we can consider concerns the alleged insufficiency of the complaint to state a cause of action, and the grounds on which insufficiency is claimed are that the complaint fails to state that the president and secretary of defendant corporation were authorized to execute and deliver the promissory note sued upon, and the complaint does not state that any money received in exchange for said note was used for the benefit of the defendant corporation.

It is alleged, and admitted by the demurrer, that defendant, "for value received, to wit, the sum of twenty thousand dollars, loaned and advanced by plaintiff to defendant," executed and delivered to plaintiff the promissory note of which a copy is set out in the complaint. If the corporation defendant received the money, it will be presumed that it was for the benefit of the corporation. It plainly appears that the transaction was between the two corporations in their

corporate capacity, and plaintiff corporation advanced the money to defendant corporation which was the "value received" by the latter for executing the promissory note. The copy shows that the corporate seal of defendant was affixed to the note, and, even if it had not been, the defendant, having received the money, could not question the validity of the note on that ground.

The objection that there was no averment in the complaint that the president and secretary were duly authorized to execute the note is without merit. The complaint shows that the promissory note purports to be the corporate act of defendant, and it was not necessary to allege that the president and secretary were authorized by resolution of the directors to execute the instrument. It will be presumed that they had such authority, since it is admitted that the corporation, for which they assumed to act, executed and delivered the note and received the consideration.

It was said in *Malone v. Crescent City etc. Co.*, 77 Cal. 38, 42, [18 Pac. 858]: "The contract is signed 'City Mill & Transportation Company by J. Wenger, President.' If the president, as such, had no authority to enter into the contract, it was a matter of defense. The allegation that the defendant made the contract is sufficient, certainly as against a demurrer."

Nor is there any merit in the contention that the abbreviations used to designate the official capacity in which the president and secretary signed the note were insufficient to show such official capacity. Courts take judicial notice of the meaning of abbreviations of words commonly used. This is the rule in respect of courts and judicial officers (Code Civ. Proc., sec. 186); and is the rule applied in ascertaining the meaning of words shortened in common use by abbreviating them. (*Estate of Lakemeyer*, 135 Cal. 28, [87 Am. St. Rep. 96, 66 Pac. 961].) In this case the court said: "Abbreviations form, indeed, part of language, and do not differ essentially in their nature from words which, like them, are themselves merely signs of thoughts."

It seems to us that the admissions implied by the demurrer substantially answer the objections upon which it purports to rely.

In its answer, after demurrer overruled, defendant admitted the execution of the note; admitted that it had paid a

considerable part of it; admitted that there was still due seven thousand five hundred dollars, and admitted that it received the full consideration, the amount stated in the promissory note. There was perhaps enough in the answer to require proof of the amount remaining unpaid and the interest to be allowed, but these were the only facts for the court to determine.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 1706. Second Appellate District.—February 11, 1916.]

W. N. WHITE, Respondent, v. STANDARD LUMBER & WRECKING COMPANY (a Corporation) et al., Appellants.

ACTION ON PROMISSORY NOTES—PAYMENT—ACCEPTANCE OF ORDER—WHEN ACTION NOT PREMATURE—CREDIT ON NOTES.—In an action on promissory notes, which by their terms were due when the action was commenced, where it appeared on cross-examination of the plaintiff that he had accepted as payment on the notes a certain order for the payment of money drawn on a third party payable after the time the action was commenced, which order was for an amount less than the face of the notes, it cannot be said that the action was prematurely commenced, but the amount of the order should be credited on the amount found due on the notes, and it is immaterial whether a judgment obtained on the order was paid.

ID.—LIABILITY OF INDORSERS—WAIVER OF DEMAND, PROTEST, AND NOTICE.—Where promissory notes state that "the makers and indorsers of this note hereby waive diligence, demand, protest, and notice," the indorsement on the back of the notes constitutes a waiver without any separate statement thereof.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Barstow, Beach & Rohe, for Appellants.

Edward Dietrich, for Respondent.

CONREY, P. J.—The defendants appeal from an order denying their motion for a new trial and from the judgment. The complaint is based upon two promissory notes dated May 17, 1911, due respectively five and six months after date, and each being for the principal sum of \$749.41, with interest. These notes were executed by Standard Lumber & Wrecking Company and made payable to the Westport Lumber Company or order, and through subsequent assignments became the property of the plaintiff. The defendants by their answer alleged that the first note was fully paid, and denied "that no part of the principal or interest on the second note has been paid, except the interest credited thereon as shown by the complaint," and denied that the said principal sum and interest, as stated in the complaint, is wholly due and unpaid. The plaintiff was the only witness at the trial of the case. On cross-examination he said: "I received the following order which was given as in payment of these notes: 'Los Angeles, Cal., Oct. 18th, 1912. Mr. C. W. Rogers, City. Dear Sir: Please pay to the order of Mr. Deitrich, of the firm of Haas & Dunnigan, the sum of one thousand dollars (\$1000.00) and charge to my account. Yours truly, W. W. Wilcox,' which was accepted as follows: 'Accepted to be paid December 24th, 1913. C. W. Rogers,' but the order was not paid." The complaint in this action was filed October 25, 1913.

On these facts the appellants claim two defenses: First, that the action was prematurely brought; second, that the amount of the foregoing accepted order should have been credited by the court on account of said notes. The first of these defenses is not sustained. The notes were due by their terms, and at the time of the commencement of this action the plaintiff was entitled to sue for any balance unpaid thereon. The other matter of defense above noted was established by the evidence. The plaintiff having received the order as in payment of the notes, on his own responsibility submitted to an acceptance for a date more than one year later than the date of the order. He admits that at some subsequent time he recovered judgment against Rogers on that order. Whether that judgment was paid is not shown and is not material to this case. It may perhaps be reasonably inferred

from the testimony that in giving the order in question Wilcox was acting as president of the defendant corporation, although that fact is not definitely set forth.

On behalf of appellants Wilcox, Moran, and Lynn it is further insisted that the complaint does not state a cause of action against them. Immediately following the copy of the note set forth in each count of the complaint, we have the words, "Indorsements as follows," followed by the names of these three defendants. Then follows a form of guaranty of payment and waiver of demand, etc., with the same three names repeated; but there is not in the complaint nor in any amendment thereof any allegation of the execution of such contract of guaranty or waiver. Such allegation was necessary if the plaintiff desired to rely upon waiver as an excuse for failure to make presentation and give notice of dishonor. "Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading." (*Hayt v. Bentel*, 164 Cal. 681, 686, [130 Pac. 432].) Here, however, it cannot be claimed that the form of indorsement of guaranty agreement constituted any part of the notes in question, of which defendant corporation was the maker.

The only allegation at all touching upon this matter is in these words: "That thereafter the defendants, W. W. Wilcox, James Moran and J. M. Lynn, indorsed the aforesaid note by signing their names thereto as follows: W. W. Wilcox, James Moran and J. M. Lynn." This was sufficient as an allegation showing that they were indorsers of the note, but no cause of action could arise against them as such indorsers without an allegation showing due presentation to the maker, dishonor, and notice to such indorsers. (*Navajo County Bank v. Dolson*, 163 Cal. 485, [41 L. R. A. (N. S.) 787, 126 Pac. 153].)

It appearing that the judgment against Standard Lumber & Wrecking Company is for an excessive amount and that no cause of action was stated against the other defendants, it is ordered that the judgment and order be and they hereby are reversed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 7, 1916, and the following opinion then rendered thereon:

CONREY, P. J.—A decision was filed herein on February 11, 1916. At that time, in stating our conclusion that the complaint failed to state a cause of action against the defendants Wilcox, Moran, and Lynn, our attention was directed to the form of guaranty and waiver on the back of the notes, as to which we found that the complaint did not allege the execution of any such guaranty or waiver. We overlooked the fact that within the notes themselves it was stated that "the makers and indorsers of this note hereby waive diligence, demand, protest, and notice." That language being contained in the notes, the indorsement by said defendants on the back of each note constituted a waiver without any separate statement thereof. (Daniel on Negotiable Instruments, 6th ed., sec. 1092.)

The decision of this court herein is hereby modified by striking therefrom the final paragraph, which was as follows: "It appearing that the judgment against Standard Lumber & Wrecking Company is for an excessive amount and that no cause of action was stated against the other defendants, it is ordered that the judgment and order be and they hereby are reversed." In lieu thereof we substitute the following: "It appearing that the judgment is for an excessive amount, it is ordered that the judgment and the order denying a new trial be and they hereby are reversed."

Respondent's petition for a rehearing is denied.

James, J., and Shaw, J., concurred.

[Civ. No. 1473. Third Appellate District.—February 11, 1916.]

G. B. HELLINGS, Respondent, v. J. W. WRIGHT,
Appellant.

REAL ESTATE BROKERS—DIVISION OF COMMISSIONS—UNEQUAL PROPORTIONS—STATUTE OF FRAUDS.—An oral agreement between real estate brokers to divide commissions on sales of real estate in unequal proportions is not within the statute of frauds.

Id.—ACTION TO RECOVER COMMISSIONS—PLEADING—COMPLIANCE WITH AGREEMENT—SUFFICIENCY OF COMPLAINT.—In an action brought to recover commissions due under such an oral agreement, the omission to allege in the complaint that the plaintiff "obtained agree-

ments from purchasers to pay the balance in monthly installments," etc., which was part of the sale plan, does not destroy the sufficiency of the complaint, as against a general demurrer, where it is alleged that sales were made under such plan, and that monthly payments were made by the purchasers.

ID.—OMISSION TO SIGN COMPLAINT—WAIVER.—The omission to sign a complaint is not jurisdictional, and the defect is waived where no objection is made thereto in the trial court.

ID.—PERFORMANCE OF CONTRACT WITHIN YEAR—STATUTE OF FRAUDS.—An oral agreement between real estate brokers to make sales and divide commissions is not void under subdivision 1 of section 1624 of the Civil Code, where the employed broker could sell for cash or on the installment plan for a sufficient amount so that his commissions could be paid within the year.

ID.—AGREEMENTS NOT PERFORMABLE WITHIN YEAR—CONSTRUCTION OF STATUTE.—The statute does not declare void a contract which may not be performed within a year, or which is not likely to be performed within that period, but it includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year.

ID.—PERFORMANCE OF CONTRACT WITHIN YEAR—PAYMENT OF CONSIDERATION AFTER YEAR—INSUFFICIENT DEFENSE TO RECOVERY.—When a contract has been so far performed that nothing remains to be done but the payment of the consideration for the performance, the fact that the contract does not require the payment within a year furnishes no defense to an action for the price.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Gerald C. Halsey, for Appellant.

Frank A. Duryea, for Respondent.

BURNETT, J.—The action was brought to recover commissions due under an oral agreement between plaintiff and defendant, both being real estate brokers. The agreement was that plaintiff, on behalf of defendant, should procure purchasers for lots in Richmond Tract No. 2, Contra Costa County, plaintiff to sell for cash, if possible, and if not, then on the installment plan, so much to be paid monthly by the purchaser and plaintiff's commissions to be paid by defendant

at the rate of one-half of the monthly payments paid in on sales made by plaintiff individually, and one-third of the monthly payments on sales made by plaintiff jointly with any other salesman; settlement to be made between the parties on the first of every month until the whole of plaintiff's commission should be paid.

The defendant had a contract in writing, duly subscribed by the owner of the lots, for the sale thereof on a commission of twenty-five per cent of the sale price, and plaintiff's commissions were to be fifteen per cent on sales made by him alone and seven and one-half per cent on sales made by him and any other salesman acting together. The plaintiff thereafter sold a certain number of lots and also a certain number in conjunction with one M. E. Dunn. Settlement between the parties was regularly had each month until about January 1, 1911, at which time plaintiff ceased selling said lots. Such settlement was made on statements rendered by defendant. One of these statements appears in full in the transcript, and it shows the names of the purchasers, a description of the lots sold, plaintiff's commissions, the amount theretofore paid plaintiff, and the amount due January 3, 1911. Said statement corresponds with that set out in the complaint herein, except in a few unimportant particulars. The testimony shows that from and after January 1, 1911, monthly payments were made by the purchasers of lots sold as aforesaid by plaintiff, and that the defendant received his commissions therefor in accordance with his written contract with the Central Richmond Land Company, but that he failed to pay plaintiff his commissions thereon. No evidence was offered by defendant, but it is insisted that the judgment is erroneous for several reasons, which we proceed to notice.

1. The first contention is that the contract being oral could not be enforced by reason of the statute of frauds. A sufficient answer to this claim is found in the following decisions: *Gorham v. Heiman*, 90 Cal. 346, [27 Pac. 289]; *Aldis v. Schleicher*, 9 Cal. App. 372, [99 Pac. 526]; *Casey v. Richards*, 10 Cal. App. 57, [101 Pac. 36]; *Saunders v. Yoakum*, 12 Cal. App. 543, [107 Pac. 1007]; *Baker v. Thompson*, 14 Cal. App. 175, [111 Pac. 373]; *Johnston v. Porter*, 21 Cal. App. 97, [131 Pac. 69]; *Hageman v. O'Brien*, 24 Cal. App. 270, [141 Pac. 33].

In the Gorham case, *supra*, it is said, in reference to the complaint, that "It shows an agreement to co-operate in obtaining authority to sell, and in selling, a mine for an equal share of the commissions. It shows that the agreement was acted upon. It shows performance on the part of plaintiffs, collection of the commissions by appellants, and refusal to divide. Certainly this establishes a cause of action if the agreement was valid, and we know of no ground upon which it can be held invalid. Counsel seem to rely on section 1624 of the Civil Code, subdivision 6. But, clearly, that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions."

In the Aldis case it is said: "Conceding that the compensation recoverable by a broker for selling real estate is the subject of an oral contract between him and another, under which agreement the latter is to recover the commission for effecting the sale, nevertheless, a complaint, in order to state a cause of action upon such oral contract, must allege that the one from whom it is sought to recover was by his principal authorized in writing to effect a sale."

So in the Casey decision it is said: "The contract of employment by an authorized broker of the plaintiff as an assistant under an agreement to share commission is not required to be in writing under the statute of frauds."

In the Hageman case it was held that, while the agreement between the brokers was to pay a definite commission, it was in effect an agreement to share commissions and hence was enforceable.

Some of the foregoing cases probably attach conditions to the enforcement of such claim that a just view of the law does not exact, but there can be no question that the facts here meet every requirement of the rule. It clearly appears, in the first place, that defendant had a written contract with the owner for the sale of said property and for the payment of a specific commission, and that he employed plaintiff to assist in the sale of said property. Furthermore, that he agreed to pay him a certain commission for every lot that he sold. This amounted, of course, to an agreement to *share* the commissions, since defendant was to obtain twenty-five per cent from the owners and of this the former was to pay to plaintiff

fifteen per cent. In other words, it was to be divided in the ratio of fifteen to ten between plaintiff and defendant. *To share* does not demand necessarily an equal division. Defendant was *to share* with plaintiff because he was to receive from the owner the whole of the commission, and he was to divide it in a certain proportion with plaintiff. It further appears that the lots were sold by plaintiff, that defendant received the commission from the owner and failed to divide as he agreed. We know of nothing more required to entitle plaintiff to recover, and we do not hesitate to say that the statute of frauds, as interpreted by the courts, has no application to this case.

2. Appellant contends that the complaint fails to state a cause of action in consequence of the omission of an allegation that plaintiff "obtained agreements from purchasers to pay the balance in monthly installments," etc. The contention is based upon the familiar principle of practice that the complaint must aver a performance of the acts required of plaintiff to entitle him to relief.

While the complaint could have been more explicit in the respect indicated, we are emphatically of the opinion that it is sufficient as against a general demurrer. There is an allegation that "Thereafter and prior to January 1, 1911, plaintiff, under and by virtue of said agreement between himself and said defendant, sold by himself sixty-one of said lots on the said monthly payment plan," etc. It simply amounts to this: Plaintiff alleges that he had a certain agreement with defendant to sell land upon a certain plan, and that he did sell it on the said plan. This necessarily implies that he complied with the terms contained in the plan. Moreover, a certain exhibit "A" is made a part of the complaint, and it is alleged that it contains a "description of said lots so sold by plaintiff individually, and of such lots so sold by plaintiff in conjunction with said M. E. Dunn separately listed and described, together with the sale price of each lot; the commissions earned by plaintiff on such sale prices, and the *monthly payments to be made* on each such lots by the purchaser thereof." There is also an allegation that the said monthly payments were made by the purchasers. No one reading these averments in connection with the other parts of the complaint would have any trouble in drawing the inference that said purchasers agreed to make said monthly payments.

Moreover, this objection is of such nature that it should have been made at the trial. When evidence was offered of the execution of said contracts this specific ground of objection was not pointed out, and appellant should not be heard now to urge this purely technical consideration. In *Greiss v. State Investment Co.*, 98 Cal. 244, [33 Pac. 195], it is said: "It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient, in order that he may have a fatal objection. Such course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated." (See, also, sec. 475, Code Civ. Proc., and *First Nat. Bank v. Henderson*, 101 Cal. 307, 312, [35 Pac. 899].)

3. It seems that the complaint was not signed by the plaintiff or his attorney, and of this appellant complains, but it is too late to take advantage of it where no objection was made in the lower court. It is a mere matter of form and could and would, of course, have been remedied if attention had been called to it below.

In *Meyer v. Delaware R. R. Const. Co.*, 100 U. S. 457, [25 L. Ed. 593], the complaint was filed in the state court but was not signed by either the plaintiff or his counsel. The cause was removed to the federal circuit court and the objection that the complaint was not signed was first raised there. On appeal the supreme court said: "No objection was made on this account in the state court, and it came too late in the circuit court. If it had been made in the state court, the defect, if in fact there was one, would no doubt have been cured at once by the signature of counsel."

In *Louisville etc. Ry. Co. v. Peck*, 99 Ind. 68, it was said: "The statute requires that pleadings shall be subscribed by the party or his attorney, but as there was no motion to strike out or reject the paragraph, and the defect is one that might have been cured by amendment below, it will not be regarded on appeal."

In *Sims v. Dame*, 113 Ind. 127, [15 N. E. 217], it is said: "The failure of both a party and his attorney to subscribe the complaint constitutes only a formal or clerical defect which is amendable in the *nisi prius* court."

Here it is to be noted that the amended complaint is verified by the attorney for plaintiff, and defendant could, there-

fore, be in no doubt as to his identification, nor could he have suffered any detriment by the omission complained of.

In *Canadian Bank of Commerce v. Leale*, 14 Cal. App. 307, 309, [111 Pac. 759], it is said: "While there is some authority in other jurisdictions to the effect that an unsigned pleading is a nullity, . . . the weight of authority is to the effect that the omission of the signature to a pleading is but an irregularity that does not affect the jurisdiction of the court and may be cured by amendment." (Citing cases.)

We think there can be no doubt that said defect is not jurisdictional, that appellant waived it by making no objection in the court below, and that it would be manifestly unjust to take cognizance of it at this time.

4. The contract between plaintiff and defendant was not void by virtue of subdivision 1 of section 1624 of the Civil Code concerning "an agreement that by its terms is not to be performed within a year from the making thereof." As pointed out by respondent, appellant confuses said agreement with the contracts procured by plaintiff from the purchasers. Plaintiff's contract could be performed within a year. He could sell for cash or on the installment plan for a sufficient amount, so that his commissions could be paid within the year, as the buyer on the installment plan was to pay *not* less than five dollars per month.

The statute does not declare void a contract which may not be performed within a year, or which is not likely to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year. (*Bank of Orland v. Finnell*, 133 Cal. 475, [65 Pac. 976]; *Stewart v. Smith*, 6 Cal. App. 152, [91 Pac. 667]; *Blair Town Lot etc. Co. v. Walker*, 39 Iowa, 406; *Plimpton v. Curtiss*, 15 Wend. (N. Y.) 336.) In the last mentioned case it is said: "The agreement set forth in the declaration in this case is not for the building of a house after the expiration of one year, but that it shall be performed at the furthest within fifteen months. There is nothing in this agreement prohibiting the defendant from completing the contract within six months or a shorter period. Suppose he had done so, and sued the plaintiff for compensation for his labor and material found, would it have been permitted to the plaintiff to have said that the contract was not to be performed within a year, and therefore not obligatory

upon him? Most clearly not. And if obligatory upon one party, it is equally so on the other. The defendant might have performed the contract within a year, and therefore it is not within the statute."

As a matter of fact, plaintiff here performed his contract within the year, and so nothing was left but the payment of the consideration.

"When a contract has been so far performed that nothing remains to be done but the payment of the consideration for the performance, the fact that the contract does not require the payment within a year furnishes no defense to an action for the price." (20 Cyc. 296, [note 13 and cases there cited].)

Moreover, our attention is called to the evidence of a letter written by appellant wherein he promised to pay respondent's commissions. Thus unmistakably was the case taken without the operation of said statute of frauds.

5. Appellant complains because the court reopened the case and allowed plaintiff to offer additional evidence after a motion had been made for a nonsuit. The purpose was to clear up any uncertainty as to whether plaintiff had obtained the required contracts from the purchasers to whom he had sold the lots on the monthly installment plan. Such action was not only within the discretion of the trial judge, but it was plainly his duty to see that the cause should not be defeated by the mere inadvertence of counsel for respondent. It seems sometimes to be thought that the highest prerogative of the trial court is to conduct the proceedings so that the cause may be won or lost by virtue of some technical advantage. The truth is, of course, that the trial court should see, if possible, that the case is tried upon its merits and decided fairly and justly.

6. But the main contention of appellant seems to be that the evidence was insufficient to support the findings, and particularly the one that respondent secured contracts of purchase on the installment plan from the various purchasers. Appellant insists upon this point both in his opening and reply briefs. In the latter he declared: "The plaintiff agreed as part of his bargain with defendant to obtain agreements from all of the purchasers to pay the balance in monthly installments of not less than five dollars until the whole sale price should be paid. Plaintiff offered no evidence whatso-

ever to show that he had actually done the work of securing signed contracts from the various purchasers to pay the purchase prices on the installment plan at the sale prices designated by the defendant for the sale thereof. There was absolutely no evidence that it was the plaintiff who induced all of the various purchasers to enter into written contracts on the installment plan at the sale prices designated by the defendant. There was absolutely no evidence introduced to show that the plaintiff had ever obtained any contracts whatsoever for the defendant or that he had ever turned over to the defendant any contracts whatever." This sweeping statement is certainly entitled to some consideration, because it will not be disputed that therein is involved a vital element of the cause of action.

The record, however, furnishes a complete refutation of appellant's claim in that regard. Plaintiff testified that the defendant "said he would employ me to sell lots on the basis of fifteen per cent of the selling price and I was to receive one-half of the first payment and one-half of the subsequent payments that were paid in by the purchaser; a statement was to be rendered on the first of every month by him to me. . . . He gave me instructions on the terms of sale, to accept from ten to twenty-five dollars down or thereabouts and generally five dollars per month." Furthermore, that he consented to these terms and started to work right after that to sell lots; that the exhibit attached to the complaint showing the names of all purchasers of lots sold by him individually and in conjunction with M. E. Dunn, the description of the lots, amount of commission, and the amount of the monthly payments, was correct; that statements were rendered him by defendant each month up to January, 1911 (the last one being set out in full in the transcript), and that said list contained "the names of purchasers of lots" to whom he had sold himself and in conjunction with M. E. Dunn, together with a description of the lots he had sold for defendant.

Certainly it is a fair inference from the foregoing that plaintiff had fully complied with the conditions of his contract. But the evidence is even more specific as to the contracts of purchase. One of these contracts is set out in full, having been executed by George Twigg, who is shown in plaintiff's exhibit to have been one of the purchasers. The other contracts were all received in evidence and they were identi-

fied by plaintiff as those obtained by him. That no question may remain, we quote from the record of the testimony of witness Rihn and of plaintiff after they were recalled: "Q. Mr. Rihn, have you got as secretary of the Central Richmond Land Company, the contracts in writing between the Central Richmond Land Company and the purchasers of lots as shown in this statement as prepared by you and which you submitted a few minutes ago? A. Yes. Q. Will you produce them, please? (The witness here produces certain papers.) Q. The contract with George Twigg—is that the contract you have in your hand there? A. Yes. Q. They are all in the same form, Mr. Rihn? A. Yes. Mr. Duryea: You know the signature of the president of the Central Richmond Land Company? A. Yes. Q. Are these the signatures of the president and secretary of the Central Richmond Land Company? A. Yes."

Mr. Hellings' testimony then appears as follows: "Q. I will ask you, Mr. Hellings, if you saw George Twigg sign that document? A. I did. Mr. Halsey: I will admit those signatures are genuine."

Mr. Rihn, furthermore, in his testimony gave the names "of the purchasers under each of those contracts and the numbers of the contracts, all of which contracts were considered read in evidence." Then the examination of plaintiff continued: "Q. Are those the contracts which were delivered to you in blank at the time you made the agreement? (Referring to contracts of sale identified by witness Rihn and read in evidence.) A. The same contracts. Q. Were those the contracts you used in obtaining purchasers for the lots? A. They were."

In view of the foregoing, how it is possible for anyone to maintain that there is no evidence that plaintiff obtained contracts of purchase from the purchasers is not readily apparent. We do not feel called upon to pursue the subject any further. We are convinced that none of the points made by appellant possesses any substantial merit, and the judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 6, 1916.

[Civ. No. 1654. First Appellate District.—February 14, 1916.]

W. C. CAVITT, Respondent, v. THOR RAJE, Appellant.

MOTION FOR CHANGE OF PLACE OF TRIAL—INTERLINEATIONS AND ERASURES IN AFFIDAVITS—FAILURE TO EXPLAIN—ERRONEOUS DENIAL OF MOTION.—On a motion for a change of place of trial, where in the notice of motion and the affidavit of merits, and other affidavits offered thereon, there were many interlineations and erasures, the failure of the moving party, upon request of the court, to say whether the alterations were made prior to the execution of the instrument does not authorize the court to exclude them from consideration and to deny the motion, where the affidavit of merits in its original form, ignoring the alterations, embraces all the essential averments of a sufficient affidavit of merits.

ID.—ALTERATION OF INSTRUMENT—WHEN MATERIAL.—If the alterations changed the meaning of the language of the instrument, or if it remedied a defective affidavit, the change would be regarded as material, and the affidavit could not then have been considered without a satisfactory explanation.

ID.—AFFIDAVIT OF MERITS—SUFFICIENCY OF.—Where in one place in the affidavit of merits as it read originally the word "stated" is omitted, the affidavit reading "I further say that I have fully and fairly — the said case in this cause" to my counsel, etc., but from what appears later in the affidavit, and reading it as a whole, it is clear that the defendant in effect avers that he made a full and fair "statement" of the case in the cause to his attorneys, the omission is not material.

ID.—CHANGE OF DOCUMENT—WHEN IMMATERIAL.—Any change made in a document after its execution, which merely expresses what would otherwise be supplied by intendment, is immaterial, and the document is in effect unaltered by it.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a motion for a change of place of trial. George E. Crothers, Judge.

The facts are stated in the opinion of the court.

J. Irving McKenna, and Catherine A. McKenna, for Appellant.

W. C. Cavitt, *in pro. per.*, for Respondent.

KERRIGAN, J.—This is an appeal from an order denying a motion by defendant for a change of the place of trial.

There is absolutely no merit in the motion to dismiss the appeal, and, contrary to the plaintiff's contention, the affidavits in the record show that the defendant at the time of the commencement of the action resided in the county of Los Angeles.

In the defendant's demand for a change of the place of trial, in the notice of motion, and in several of the affidavits which were filed in the proceeding, there were many interlineations and erasures. This is so with reference to the affidavit of merits verified and filed by the defendant; and it is the plaintiff's principal claim in support of the order of the trial court that the defendant, although requested, refused to say that the alterations therein were made prior to the execution of the instrument, and that upon objection by plaintiff upon that ground the court excluded the same from consideration, and accordingly denied said motion. The record, however, does not show that the defendant was asked to account for the appearance of the alterations, or that he refused to do so; or that plaintiff made any objection to the consideration of the affidavit of merits, or that the court failed to consider it. The court, however, in its order denying the motion, significantly says that having "seen and read the affidavits, etc., the motion is denied"; and since the parties have discussed the matter in their briefs as though the motion were denied on the ground stated, it may not be amiss to briefly review the matter.

Upon examining the affidavit in its original form, and ignoring the alterations, it is found to embrace all the essential averments of a sufficient affidavit of merits (*Watkins v. Degener*, 63 Cal. 500; *Nolan v. McDuffie*, 125 Cal. 334, [58 Pac. 4]), and therefore the interlineations and erasures in the affidavit complained of are wholly immaterial, and defendant was entitled to have it read and considered on the hearing of the motion. If the alteration changed "the meaning of the language of the instrument" (Code Civ. Proc., sec. 1982), or if it remedied a defective affidavit, the change would be regarded as material, and the affidavit could not then have been considered without a satisfactory explanation (Code Civ. Proc., sec. 1982). "A material change or alteration of an instrument is one which causes it to speak a language different

in legal effect from that which it originally spoke" (2 Corpus Juris, p. 1173, sec. 2, p. 1178, sec. 7). In one place in the affidavit as it read originally the word "stated" is omitted, the affidavit reading, "I further say that I have fully and fairly — the said case in this cause" to my counsel, etc.; but from what appears later in the affidavit, and reading it as a whole, it is clear that the defendant in effect avers that he made a full and fair "statement" of the case in said cause to his attorneys. In other words, in supplying or inserting in the affidavit the word "stated," assuming it was done after its execution, the defendant did no more than the court would have done for him, and that change in or addition to the affidavit may therefore be regarded as immaterial. (*Humphreys v. Crane*, 5 Cal. 173; *First Nat. Bank v. Wolff*, 79 Cal. 69, [21 Pac. 551, 748]; *Rogers v. Shaw*, 59 Cal. 260; *McGowan v. Supreme Court, etc.*, 107 Wis. 462, 469, [83 N. W. 775]; 2 Corpus Juris, p. 1198, sec. 44.) Any change made in a document after its execution, which merely expresses what would otherwise be supplied by intendment is immaterial, and the document is in effect unaltered by it. (2 Corpus Juris, p. 1193, sec. 34.)

From what has been said it appears that the defendant was entitled to an order changing the place of trial to the county of Los Angeles, and that the court erred in its order denying defendant's motion.

The order is reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 12, 1916.

[Civ. No. 1786. Second Appellate District.—February 14, 1916.]

ELLIE BARR CROFFORD, Appellant, v. GEORGE CROFFORD, Respondent.

ACTION TO RECOVER AUTOMOBILE—ALLEGED GIFT—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.—In an action to recover possession of an automobile, claimed to have been given plaintiff by her husband, since deceased, where the evidence is conflicting, but there is substantial evidence tending to support the findings of the trial court, its decision cannot be disturbed on appeal.

ID.—MOTION FOR NEW TRIAL—CONFLICTING EVIDENCE.—The weight of conflicting evidence will not be considered on an appeal from an order granting or refusing a new trial.

ID.—HUSBAND AND WIFE—GIFT—UNDUE INFLUENCE—PRESUMPTION.—Upon a gift from a husband to his wife, undue influence of the wife over the husband is not presumed from the mere relation of husband and wife.

ID.—APPEAL—RECORD ON—AFFIDAVITS.—Affidavits, although contained in the printed transcript, which are not in any manner authenticated as a part of the record on appeal, cannot be considered by the appellate court.

ID.—MOTION FOR NEW TRIAL—AFFIDAVITS—FAILURE TO SERVE IN TIME.—Affidavits of newly discovered evidence cannot be considered on a motion for a new trial where they were not served until more than ten days after the service and filing of the notice of intention to move for a new trial, and no extension of time therefor having been granted.

ID.—MOTION FOR NEW TRIAL—DISCRETION OF COURT.—It is within the discretion of the trial court to determine that facts stated in affidavits of newly discovered evidence were not sufficient to warrant granting of a new trial, and its decision will not be disturbed on appeal where the circumstances are such as in the case at bar.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Ben S. Hunter, and Emmett W. Miller, for Appellant.

Fred N. Arnoldy, for Respondent.

CONREY, P. J.—This is an action wherein the plaintiff demanded judgment for possession of an automobile, or the

value thereof in case delivery could not be had. She appeals from the judgment against her, and from an order denying her motion for a new trial.

Under her specifications of insufficiency of the evidence to justify the decision, appellant's claim goes only to the point that the weight of evidence is in favor of the proposition that plaintiff acquired the automobile by gift from her husband, Dr. Thomas J. Crofford, and that since the time of such gift she has been the owner and entitled to possession thereof. The said Dr. Thomas J. Crofford is now deceased, and the defendant is administrator with the will annexed of his estate, and as such administrator was by the court found to be in possession, and entitled to the possession, of said property. There is a sharp conflict in the evidence, but there is evidence of a substantial nature tending to support the finding of the court. The argument on behalf of appellant is based upon the notion, refuted in almost every volume of the reports, that the weight of conflicting evidence will be considered on appeal from an order granting or refusing a new trial.

The second proposition of appellant is that upon a gift from a husband to his wife, undue influence of the wife over the husband is not presumed from the mere relation of husband and wife. As admitted by her counsel, it does not appear from the findings that the court below disagreed with him respecting this doctrine; and at all events the matter was merely incidental to the determination of the ultimate fact as to whether there was or was not a gift made by Dr. Crofford to the plaintiff.

Finally, appellant claims that a new trial should have been granted on the ground of newly discovered evidence, as shown by affidavits. These affidavits, although contained in the printed transcript, are not in any manner authenticated as a part of the record on appeal, and therefore they cannot be considered by this court. (*Skinner v. Horn*, 144 Cal. 278, [77 Pac. 904].) If they could be considered as a part of the record, it would be found that they were not served until more than ten days after the service and filing of plaintiff's notice of intention to move for a new trial, and that no extension of time therefor was granted. This was sufficient to exclude them from the consideration of the court at the hearing of the motion. (Code Civ. Proc., sec. 659.) Furthermore, if the affidavits had been served in time, and if we were author-



ized to consider them as a part of the record on appeal, we would find that they were directed to a probative fact not conclusive upon the merits of the case. Even if the lower court considered these affidavits as having been filed in due time, it was within the discretionary right of that court to determine that the facts therein stated were not sufficient to warrant the granting of a new trial; and under the circumstances its conclusion would not be disturbed by this court.

The appeal is both groundless and frivolous, and apparently must have been made for purposes of delay. The judgment and order are affirmed, and it is ordered that the respondent recover damages in the sum of fifty dollars in addition to his costs.

James, J., and Shaw, J., concurred.

[Civ. No. 1956. Second Appellate District.—February 14, 1916.]

THOMAS HESTER, Appellant, v. ED McMULLAN,
Respondent.

APPEAL—ORDER DENYING NEW TRIAL—DISMISSAL—AMENDMENT OF 1915 TO SECTION 963, CODE OF CIVIL PROCEDURE.—Under the amendment of 1915 to section 963 of the Code of Civil Procedure, which took away the right theretofore existing in a party to appeal from an order refusing a new trial, an appeal from such an order taken after the amendment became effective must be dismissed, although the proceedings for a new trial were instituted prior thereto.

ID.—CONSTRUCTION OF SECTION 939, CODE OF CIVIL PROCEDURE—AMENDMENT OF 1915.—Section 939 of the Code of Civil Procedure, as amended in 1915, does not enlarge the right of a party to appeal in cases other than those specified in section 963 of the Code of Civil Procedure.

MOTION to dismiss an appeal from an order of the Superior Court of Imperial County denying a new trial.

The facts are stated in the opinion of the court.

E. A. Simon, and Galen Nichols, for Appellant.

O. O. Willson, Dan V. Noland, and Walter B. Kibbe, for Respondent.

JAMES, J.—Motion to dismiss an appeal taken from an order denying the application of the plaintiff for a new trial. The principal ground of the motion is, as stated in the notice, that the law does not provide for the taking of an appeal from such an order. It appears that on the twenty-sixth day of April, 1915, a judgment was entered in the cause; that on June 25th plaintiff filed an undertaking on appeal; and that on October 15, 1915, a statement of the case on motion for a new trial was settled by the judge, and the notice of appeal from the order denying plaintiff's motion for a new trial was filed on the seventeenth day of December, 1915. No appeal was taken from the judgment. The legislature of the year 1915 enacted a statute amending section 963 of the Code of Civil Procedure, and by that amendment took away the right theretofore existing in a party to appeal from an order refusing a new trial. This statute became effective in August, 1915; so that at the time the order was entered denying to the plaintiff a new trial there was no statute law permitting an appeal to be taken therefrom. It is complained that if such effect be given to the statute as to deprive plaintiff of his privilege of taking an appeal from the order denying the motion for a new trial, rights will be interfered with which became vested prior to the taking effect of the statute, and the statute, to that extent, would be invalid. *Pignaz v. Burnett*, 119 Cal. 157, [51 Pac. 48], is the principal case cited. There the question was as to what effect should be given a statute which limited the right of appeal from a judgment which had been entered prior to the time that the statute took effect. The supreme court held that upon the entry of the judgment the right of appeal became vested for the full time allowed by the statute then existent. The plain inference to be drawn from the argument of that decision, viewed negatively, is that, had the statute taken effect prior to the time of the entry of the judgment, its effect would have been to limit the right of appeal from the judgment. It is here argued that, because the plaintiff had instituted proceedings in the direction of applying to the court for an order granting him a new trial, therefore the making of the order would be considered as relating back so as to relieve the appeal from the effect of the statute. If this argument be of force, then in those cases where, like the one above cited, the date of the entry of the judgment was viewed as the material thing, it



might as well have been held that the plaintiff, when he filed his action and so instituted a proceeding which eventuated in a judgment, caused a right to accrue to the adverse party in the matter of the taking of his appeal which could not be affected by the changed statute, regardless of the date of the actual entry of the judgment, whether that entry was before or after the statute took effect. We find no added weight given to the appellant's argument in opposition to this motion to dismiss, by an examination of *Boin v. Spreckels Sugar Co.*, 155 Cal. 612, [102 Pac. 937]; *Estate of Richmond*, 9 Cal. App. 402, [99 Pac. 554]; and *People v. Nash*, 15 Cal. App. 320, [114 Pac. 784], all of which he cites, as those decisions go no further than does the announcement of the court as expressed in *Pignaz v. Burnett*, 119 Cal. 157, [51 Pac. 48]. Neither do we find that section 939 of the Code of Civil Procedure, as amended in 1915, enlarges the right of a party to appeal in cases other than those specified in section 963 of the Code of Civil Procedure.

The motion to dismiss the appeal attempted to be taken from the order denying to the plaintiff a new trial is granted.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1955. Second Appellate District.—February 14, 1916.]

GWYNN E. HOPKINS, Respondent, v. CHARLES L. SANDERSON et al., Appellants.

APPEAL—MOTION TO DISMISS—SUFFICIENCY OF NOTICE OF APPEAL—RULE OF CONSTRUCTION.—A liberal rule of construction must be applied to notices of appeal in order to effectuate the rights of the parties to an appeal.

ID.—SUFFICIENCY OF NOTICE—FAILURE TO NAME ALL DEFENDANTS.—In an action against five defendants composing a board of trustees of a high school district, an appeal from the judgment will not be dismissed upon the alleged insufficiency of the notice of appeal which in the title merely describes the defendants as "Charles L. Sanderson et al., Defendants" (without naming each defendant), but in the body of the notice states "that the defendants above named desire to appeal and do hereby appeal . . . from the whole of that certain order . . . and from the whole of the judgment of the aforesaid Superior Court, etc."

MOTION to dismiss an appeal from a judgment of the Superior Court of Los Angeles County, and an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

A. J. Hill, County Counsel, Hugh Gordon, Deputy County Counsel, and Frederick W. Smith, for Appellants.

M. P. Hopkins, for Respondent.

JAMES, J.—Motion to dismiss appeal for alleged lack of sufficient notice. The respondent, as appears both from the affidavit of her attorney and the certified copies of documents presented by defendants, sued for and obtained judgment of *mandamus* against Charles L. Sanderson and four other persons mentioned in the title of the suit by name and as composing the board of trustees of the Whittier Union High School District. A notice of appeal was given. That notice bore at its head the title of the case in the following form: "Gwynn E. Hopkins, otherwise known as Mrs. M. P. Hopkins, Plaintiff, vs. Charles L. Sanderson et al., Defendants." In the body of the notice it was stated "that the defendants above named desire to appeal and do hereby appeal . . . from the whole of that certain order . . . and from the whole of the judgment of the aforesaid Superior Court . . . ; and the defendants hereby request that the transcript of the testimony and evidence taken, . . . be made up and prepared." The point upon which a dismissal of the appeal is asked is that the notice was insufficient to institute an appeal on behalf of all of the defendants who were sued in the action, as they are not named in the title which appears at the head of the notice of appeal. As has already been stated, the defendants compose the board of trustees of the Whittier Union High School District and were sued jointly as such. Taking the notice of appeal in its substance, it seems very clear that the intention was made manifest to take an appeal on behalf of all of the defendants. There would be no room for question as to the sufficiency of this notice had the defendants, after designating the title as they have at the head of their notice of appeal, proceeded to state "that the defendants in the above-entitled action desire to appeal and do hereby appeal." And in view of the liberal rule of construction which must be applied to

such notices in order to effectuate the right of the parties to an appeal, we feel it but reasonable to hold that the language employed by the defendants in the body of their notice, wherein the words are used, "the defendants above named," should be construed as indicating all of the defendants sued in the action and against whom judgment was entered. As sustaining the view that these notices should be liberally construed, we refer to the decision in the case of *Estate of Nelson*, 128 Cal. 242, [60 Pac. 772], in which case the supreme court suggests that where a notice of appeal is imperfect in a matter not deemed of vital substance, leave to correct under the permission given by section 473 of the Code of Civil Procedure might be taken. There is hardly any room for the claim in this case that the plaintiff could have been misled by the notice of appeal and left in doubt as to which of the parties intended to seek a review of the judgment awarded to her. The defendants composed an official board, and their interest in the action was, in that particular, joint. Necessarily, as plaintiff's counsel himself suggests, the appeal should be on the part of all of the defendants or none at all. Clearly, then, where the plural form was made use of in the wording of the notice of appeal, the intention was apparent that all of the defendants should be affected by the proceedings.

The motion to dismiss the appeal is denied.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 462. Second Appellate District.—February 14, 1916.]

In the Matter of Application of **PERCY HOWELL** for a Writ of Habeas Corpus.

CRIMINAL LAW—APPEALS FROM JUSTICE'S COURT—CONSTRUCTION OF SECTION 1466, PENAL CODE.—The provisions of section 1466 of the Penal Code, that the parties may appeal from justices' judgments "in like cases and for like cause as appeals may be taken to the supreme court," does not make applicable all of the provisions respecting the preparation of the record to be used on appeal as the same are outlined in title IX of said code.

ID.—GIVING NOTICE OF APPEAL AND FILING BOND—LOSS OF JURISDICTION BY JUSTICE.—The filing of a notice of appeal from a judgment of the justice's court and furnishing the required bail in the amount fixed by the justice, after conviction on a misdemeanor charge, ousts the justice of jurisdiction to proceed further, and removes the cause to the superior court, notwithstanding the appellant does not prepare his statement on appeal within the time prescribed by law; and the justice has no power, until the superior court dismisses the appeal, to issue an order attempting to release the bail and commit the defendant to the custody of the sheriff.

APPLICATION for a Writ of Habeas Corpus originally made to the District Court of Appeals for the Second Appellate District to discharge the respondent from the custody of the sheriff of Los Angeles County.

The facts are stated in the opinion of the court.

William J. Hanlon, and Walter T. Casey, for Petitioner.

Thomas Lee Woolwine, District Attorney, and W. C. Doran, Deputy District Attorney, for Respondent.

JAMES, J.—Application upon *habeas corpus* for an order requiring that petitioner be discharged from the custody of the sheriff of the county of Los Angeles. The return admits the facts stated in the petition. It appears that, after trial upon a charge amounting to a misdemeanor, had in the justice's court of San Jose township in the county of Los Angeles, petitioner was sentenced to pay a fine of five hundred dollars, or be imprisoned in the county jail until that fine be satisfied, and judgment of further imprisonment for a period of six months was imposed. The validity of that judgment is not here in question. After sentence, and within the time allowed by law, the defendant gave notice of appeal and deposited the sum of one thousand dollars as bail upon appeal, that amount being fixed by the justice. More than fifteen days thereafter, no statement on appeal having been prepared and no further proceedings having been taken or notices given on the part of the appellant, the justice, of his own motion, attempted to release the bond and issued a commitment, declining to retain the money given as bail pending appeal, which the defendant still offered and tendered to him. Under the commitment defendant was taken into custody,

and is now confined in the county jail. There is some uncertainty in the statement in the petition as to the conditions concerning the release of the cash bond; but as no point is made touching that matter by respondent, we will consider briefly the principal question presented. The position of respondent is, as represented by the district attorney, that the giving of the notice of appeal and the bail on appeal in the amount fixed by the justice were not sufficient to effectuate an appeal unless other proceedings were taken to prepare a record to be used in the appellate court. It is claimed that the sections found in title IX of part II of the Penal Code, which relate particularly to appeals to the supreme court, and wherein certain proceedings are required of the appellant in the way of giving notice for the preparation of his record, etc., are applicable. Section 1466 et seq. of the Penal Code provide particularly for appeals to be taken to the superior court. Section 1466 reads as follows: "Either party may appeal to the superior court of the county from a judgment of a justice's or police court, in like cases and for like cause as appeals may be taken to the supreme court." Section 1468 provides that the appeal to the superior court from such judgment of a justice's or police court is to be heard upon a statement of the case settled by the justice or police judge, which statement must be filed and settled by the court within ten days after the filing of notice of appeal. The provision contained in section 1466, that parties may appeal from justices' judgments "in like cases and for like cause as appeals may be taken to the supreme court," we think does not by necessary effect make applicable all of the provisions respecting the preparation of the record to be used on appeal as the same are outlined in title IX referred to. Section 1466 states merely that the appeals are to be taken in like cases and for like cause, but nowhere does its provisions carry the inference that the procedure in the preparation of the appeal is to be the same as where the appeal is taken from a judgment of the superior court. Added force is given to this conclusion when we refer to the terms of section 1468, which expressly provides that the appeal is to be heard upon a statement of the case settled by the justice. If the appeal is to be so heard, then surely the general sections relating to appeals touching the manner of preparation and kind of record to be used, cannot apply. Section 1468 is complete and exclusive in its

relation to appeals from justice's and police courts. The filing of the notice of appeal and furnishing the required bail in an amount as fixed by the justice had the effect of ousting the jurisdiction of the justice's court to act further, and removed the cause to the superior court. This, notwithstanding that it might follow that the appeal should be dismissed for lack of a sufficient record upon which to present any available question. Upon this application, however, that question is of no materiality. If the defendant's case was by the appeal taken transferred to the superior court, the justice of the peace could not lawfully issue a jail commitment until some order had been made by the superior court disposing of the appeal.

It is ordered that, upon production to the sheriff of a certificate of the justice showing the receipt by him of the amount of one thousand dollars, heretofore fixed as bail upon appeal, petitioner be discharged from custody.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1494. Third Appellate District.—February 14, 1916.]

C. D. JUDD, Petitioner, v. SUPERIOR COURT OF
HUMBOLDT COUNTY, Respondent.

JUSTICE'S COURT—APPEAL—TIME FOR FILING UNDERTAKING.—Under section 978a of the Code of Civil Procedure, as amended in 1909, the time for filing an undertaking on appeal from a justice's court begins to run from the date of the filing of the notice of appeal, and not from the date of the service of such notice, and the filing of a notice of appeal and undertaking on the same day is a compliance with the statute, notwithstanding notice of the appeal was served seven days before it was filed.

ID.—SUFFICIENCY OF UNDERTAKING.—Where the form of an undertaking on appeal constitutes a bond on appeal as well as an undertaking to stay execution, if the undertaking is sufficient as an appeal bond, jurisdiction of the appeal is acquired, regardless of the sufficiency of the bond to stay execution.

ID.—UNDERTAKING—INCORRECT RECITAL OF JUDGMENT.—An incorrect recital of the date of the rendition of judgment in the undertaking accompanying the notice of appeal does not invalidate the undertaking nor affect the jurisdiction of the appeal.

ID.—NOTICE OF APPEAL—INCORRECT RECITAL OF JUDGMENT.—An incorrect recital in a notice of appeal of the date of the rendition of the judgment does not render the notice invalid where the judgment is otherwise correctly described.

ID.—JUSTIFICATION OF SURETIES—SUBSTITUTION OF NEW SURETIES.—Where the sureties on an undertaking on appeal are required to justify, there is no objection to the substitution for a surety who fails to appear of a new surety who signs the same bond and justifies, where the names of the original sureties are not inserted in the body of the instrument.

APPLICATION for a Writ of Prohibition originally made in the District Court of Appeal of the Third Appellate District directed against the Superior Court of Humboldt County.

The facts are stated in the opinion of the court.

S. R. Beloath, N. J. Nelson, and Arthur J. Thatcher, for Petitioner.

T. A. Salvage, for Respondent.

BURNETT, J.—Petitioner seeks to prohibit the superior court from trying an action originally tried in the justice court of Bucksport township of said county. The facts are stipulated and need not be set out at length. In said superior court a motion was made by petitioner herein to dismiss the appeal upon the ground that the court was without jurisdiction, but it was denied. The reasons for the claim of want of jurisdiction are stated as follows: "First. That the notice of appeal was not sufficient because it did not recite the correct date of the judgment; Second. That the notice of appeal was served more than five days prior to the filing of the undertaking; Third. The undertaking was defective in this, that the date of entry of judgment was incorrectly stated; Fourth. That the undertaking on appeal was defective in this, that the justice of the peace permitted a new surety to sign the undertaking and to justify in the place of one of the original sureties; and Fifth. That the undertaking to stay execution was not in double the amount of the judgment including costs and that the court had no right to permit the appellant to give a new bond to stay execution."

To these points, however, petitioner seems to attach little importance, except to the second. This he argues earnestly



and at considerable length, though it is apparently as destitute of merit as any of the others. The statute itself and the decision of the supreme court in *Rigby v. Superior Court*, 162 Cal. 334, [122 Pac. 958], as we understand them, are directly opposed to petitioner's contention that the five days within which the undertaking must be filed must date from the time of service of the notice of appeal.

Section 978a of the Code of Civil Procedure, as amended in 1909, provides: "The undertaking on appeal must be filed within five days after the *filing* of the notice of appeal and notice of the filing of the undertaking must be given to the respondent."

The supreme court, in said decision, points out the changes that have been made in the law in respect of the procedure in taking appeals and, among other things, says: "The time for filing the undertaking does not begin to run, as before it was construed to begin, at the time of the rendition of the judgment. Another event, the filing of the notice of appeal, now fixes the beginning of the period."

As to the fact herein, the stipulation is: "That on the 19th day of July, 1915, said Stouder *filed* or caused to be *filed* in said justice's court and with the justice of said court, the said notice of appeal, . . . and on the same day filed with said justice's court and with the justice of said court an undertaking. . . . That on the 21st day of July, 1915, the said Chas. H. Stouder served upon petitioner herein a notice of filing notice of appeal and undertaking on appeal," etc. It thus appears that the notice of appeal and the undertaking were filed the same day and two days thereafter notice was given of the filing of the same. Thus was said statute strictly complied with, and it is of no moment that said notice of appeal had been served upon petitioner seven days before it was actually filed.

As to the form of the undertaking it is apparent that it constituted a bond on appeal as well as an attempted undertaking to stay execution. But its sufficiency to perform the latter function is not a jurisdictional question and is not involved in this proceeding. If the undertaking was sufficient as an appeal bond, the superior court acquired jurisdiction of the cause regardless of the sufficiency of said bond to stay execution. And it may be said, also, that it is a matter of no moment here whether the superior court was justified in allowing an undertaking to stay execution to be filed in that court.

At most, it was an error not involving a question of jurisdiction and not to be corrected in this proceeding. Besides, the appeal on questions of law and fact operated to vacate and set aside the judgment rendered in the justice court, and thus if error was committed in allowing said undertaking to be filed it was without prejudice.

In *Bullard v. McArdle*, 98 Cal. 355, [35 Am. St. Rep. 176, 33 Pac. 193], it is said: "By perfecting the appeal from the justice court the case was entirely removed from that court and only the superior court has thereafter jurisdiction in the matter. The judgment in the justice court was not merely superseded but by the removal of the record was vacated and set aside. When the effect of the appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court as if originally brought therein, as is the case when appeals are taken from a justice's court on questions of both law and fact, the judgment appealed from is completely annulled and is not thereafter available for any purpose."

The points made by petitioner are, indeed, clearly and correctly answered in the opinion of the Honorable George D. Murray, judge of said superior court, filed in denying said motion to dismiss said appeal, as follows:

"This is a motion to dismiss an appeal taken by the defendant on questions of both law and fact from a judgment rendered against him in the above-entitled action by the justice's court of Bucksport township.

"In the notice of appeal the date of the rendition of the judgment rendered by the justice's court is incorrectly stated, but otherwise the notice correctly describes the judgment.

"It is conceded that only one judgment was rendered by the justice in the case, and it will be noted that the section of the code providing for the notice of appeal does not require the date of rendition of the judgment to be stated in the notice. Under such circumstances the notice of appeal in question sufficiently describes the judgment rendered in the action as the one appealed from although the date of its rendition is incorrectly stated. It is a sufficient notice of appeal.

"In *Sherman v. Rolberg*, 9 Cal. 17, the court had under consideration an appeal from a justice's court in which the notice of appeal stated that the judgment appealed from was rendered July 4, 1857, whereas as a matter of fact it was rendered

July 2, 1857. Concerning that notice the supreme court said: 'The mistake in the date of the judgment, as stated in the notice of appeal which was served on respondents, was not material. The notice is sufficient.'

"The fact that in the recital of the rendition of the judgment in the undertaking accompanying the notice of appeal, the date of such rendition is incorrectly stated, is not material and does not invalidate the undertaking, for the same reasons that the incorrect recital did not invalidate the notice of appeal.

"The undertaking filed with the justice at the same time the notice of appeal was filed, contains an undertaking on the part of the sureties in the sum of \$100.00 for the payment of costs on appeal, and also an undertaking on their part in the sum of \$330.00 to stay execution on the judgment appealed from. The undertaking on appeal may be in the same instrument with the other undertaking to stay execution. And it may be sufficient as an undertaking on appeal and insufficient to stay execution on the judgment. (Hayne on New Trial and Appeal, 1st ed., sec. 214.)

"The undertaking on appeal contained in said instrument is in the following form: 'Now, therefore, in consideration of the premises and of such appeal, we the undersigned residents of said county and state do hereby undertake, jointly and severally, in the sum of one hundred dollars, and promise on the part of appellant to pay all costs which may be awarded against the appellant on said appeal,' etc.

"The undertaking staying execution contained in said instrument is in the following form: 'And whereas, the appellant claims a stay of proceedings and is desirous of staying execution of said judgment so appealed from, we do further in consideration thereof, and of such stay,' etc.

"The instrument was subscribed by Peter Delany and E. Swanson at the time it was filed with the justice. The sufficiency of the sureties was excepted to and the sureties were notified to appear before the justice and justify. At the appointed time, or the time to which the matter was continued, Peter Delany was out of the county, but E. Swanson appeared and with him W. H. Bowersox. Over the objection of the plaintiff W. H. Bowersox was permitted to sign (subscribe) the instrument. Both E. Swanson and W. H. Bowersox then justified and the justice of the peace approved the undertaking.

"As I read the opinion of the supreme court of this state in *Bennett v. Superior Court*, 113 Cal. 440, [45 Pac. 808], that decision is by implication an authority for the procedure followed in the case before us. That case involved an appeal from a judgment of a justice's court in San Diego county. The undertaking on appeal was in the following form: 'Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, E. W. Newkirk, and E. W. Chase, of the county of San Diego, aforesaid, do hereby jointly and severally undertake in the sum of one hundred dollars that the appellants will pay all costs which may be awarded against them on the said appeal,' etc. The undertaking was signed by Newkirk and Chase. The respondent excepted to the sufficiency of the sureties and on the day appointed for the sureties to justify Newkirk did not appear and did not justify. But Chase appeared and with him one Gassen. Gassen was permitted over objection to sign the undertaking already on file, and then he and Chase justified and the undertaking was approved by the justice. The supreme court said, in the course of its opinion: 'In this case Newkirk, one of the sureties, failed to appear and justify, and if the proceedings had been left in that situation the appeal would necessarily fail, as provided by the law we have quoted. Did the appearance of Gassen in the case cure the trouble? It did not. As the undertaking is presented to us, we are clear that Gassen could not be held liable if a recovery were sought upon it.' . . . It appears that Gassen does not agree to do anything. He makes no promises. He does not acknowledge himself to be bound in any amount or upon any conditions. His name is simply attached to an undertaking which, upon its face, shows that he is not a party to it. . . . Here the names of the two purported sureties are inserted in the body of the bond, and Gassen's name is not one of them; the insertion of these two other names results in the necessary exclusion of his name. It cannot be assumed that his name was intended to be placed there, for there is no room for it; the space which it should occupy is already taken; in effect, his name is expressly excluded. Without an agreement of some kind upon his part to be bound no obligation rests upon him, and here there is no agreement. Newkirk having failed to justify, and Gassen not being bound by the undertaking, the appeal must fail as lacking in the essential requisite of a valid undertaking.'

"The supreme court did not criticise the procedure of permitting Gassen to sign the undertaking at the time of the justification and we assume from such omission that such procedure is not objectionable. The sole criticism was that it did not become Gassen's bond, and that conclusion came from the fact that the peculiar wording of the body of the bond, to-wit: 'We, the undersigned, E. W. Newkirk and F. E. Chase,' expressly excluded Gassen, and everyone else except Newkirk and Chase. The inference is that if the undertaking had not so excluded Gassen, he would have become bound by his signing it, and that under such circumstances the undertaking would have been sufficient. Chief Justice Beatty dissented from the majority decision in the Bennett case, saying that 'Gassen by signing the bond became a party to and was bound by it.'

"In the case before us, the names of the sureties were not inserted in the body of the instrument. It is 'We the undersigned' who are bound. The name of Bowersox was not excluded from the list of sureties to be bound, and in my opinion he became bound upon the undertaking and the undertaking thereby became a sufficient undertaking in the sum of \$100.00 for the payment of costs upon this appeal.

"The undertaking on this appeal was filed with the justice within five days after the filing of the notice of appeal and both were filed within thirty days after the rendition of the judgment. In fact, the new surety, Bowersox, had signed the undertaking, and both he and the other surety, Swanson, had justified within five days after filing the notice of appeal, and within thirty days after the rendition of the judgment. Both the notice and the undertaking were in time."

The order to show cause is discharged and the writ is denied.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1436. Third Appellate District.—February 14, 1916.]

GEORGE H. RUCKER, Respondent, v. SAMUEL CARPENTER, Appellant.

PROMISSORY NOTE—INDORSEMENT—PASSING OF TITLE.—The signature of the payee of a promissory note on the back below the words "demand, notice and protest waived" constitutes a sufficient indorsement to pass the title to the holder.

ID.—EVIDENCE—ASSIGNMENT—TIME OF.—In an action on a promissory note, it is not error to allow the plaintiff to testify, over objection, when and where the note was assigned to him, the objection not being that the question assumed an assignment made, where the witness testified that the note was assigned to him for a valuable consideration and had never been paid.

APPEAL from a judgment of the Superior Court of Siskiyou County, and from an order denying a new trial. James F. Lodge, Judge.

The facts are stated in the opinion of the court.

L. F. Coburn, for Appellant.

James D. Fairchild, for Respondent.

CHIPMAN, P. J.—Plaintiff alleges in his complaint that, on May 20, 1913, at Charlestown, West Virginia, defendant executed and delivered to J. R. Pentuff his promissory note in words and figures following:

"\$600.00. Charlestown, W. Va., May 20th, 1913.

"Six months after date, I promise to pay to the order of J. R. Pentuff, Six Hundred Dollars for value received, negotiable and payable at the Farmers and Merchants Deposit Co., Charlestown, W. Va.

"SAMUEL CARPENTER,
"Post office, Gazelle, Cal."

That, prior to the commencement of this action, for a valuable consideration, said J. R. Pentuff sold, assigned, and transferred said promissory note to plaintiff, and plaintiff ever since has been, and now is, the owner and holder thereof; that at maturity, to wit, on November 20, 1913, said note was presented at said Farmers and Merchants' Deposit Company, at

Charlestown, West Virginia, to defendant for payment but payment was not made; that due notice thereof was given to said Pentuff; that defendant has not paid said note or any part thereof to said Pentuff or to plaintiff, and the whole thereof is due, owing, and unpaid, together with interest at seven per cent per annum from said May 20, 1913, amounting to \$58.80. The complaint is verified.

A general demurrer to the complaint was overruled and defendant answered: Denied the alleged sale and transfer of said note and plaintiff's alleged ownership thereof, but did not deny its execution and delivery; denied, on information and belief, that said note was presented for payment or that due notice thereof was given to said Pentuff as alleged in the complaint; denied that "said note was ever presented to him in person at any time or place." For further answer, alleged that said note was given by defendant to said Pentuff as security for the payment of three hundred dollars and no more; that three hundred dollars was all the money or thing of value received by defendant for said note.

A jury was waived and the court tried the cause and made the following findings: That defendant executed and delivered the note as alleged in the complaint, setting out the note in the findings; that, prior to the commencement of the action, said Pentuff sold and transferred said note to plaintiff, who ever since has been, and now is, the owner and holder thereof, and that at its maturity as alleged in the complaint the note was presented for payment as alleged and was not paid, and that due notice thereof was given said Pentuff and that neither said Pentuff nor defendant has paid the same nor any part, but the whole thereof is due and unpaid, together with interest at six per cent per annum from May 20, 1913. Thereupon judgment was duly entered for the sum of \$670.40 and costs, amounting to \$14.25.

Defendant appeals from the judgment and the order denying his motion for a new trial, and brings up the record under the alternative method.

The testimony was taken by deposition. Plaintiff testified that he is the holder and owner of the promissory note attached to his deposition, which reads as set out in the complaint and was thus indorsed: "May 22, 1913. Demand, notice and protest waived. J. R. Pentuff." Also indorsed with rubber stamps under the foregoing as follows: "Pay to the

order of any Bank, Banker or Trust Co., prior indorsements guaranteed, Nov. 11th, 1913, the Arlington National Bank, 69-424, of Rosslyn, Va., 68-424, G. T. Merchant, Cashier." Plaintiff testified to the genuineness of Pentuff's signature. He was asked the following question: "When and where was said note assigned to you?" To which defendant objected "on the ground that it called for the conclusion of the witness, that it was incompetent, and not the best evidence." The objection was overruled and defendant excepted. Plaintiff answered: "May 22, 1913, at Arlington National Bank, Rosslyn, Va." He testified further, without objection, that "the note was assigned for a valuable consideration"; that it was cashed and he paid the money to Pentuff, and neither defendant nor anyone else "has ever made any payment on account of said note and that the note was protested." The note was then offered in evidence as above set out, to which defendant objected on the ground "that the same was not indorsed by Pentuff and further that it appears that the Arlington National Bank, on November 11, 1913, had indorsed it payable to any bank, banker or trust Co. and that no bank, banker or trust Co. had subsequently indorsed the same to anyone or at all; that the same was incompetent, irrelevant and immaterial." The objection was overruled and defendant excepted.

On cross-examination plaintiff testified as follows: "The arrangements regarding said note other than appears thereon was Pentuff gave his note for 90 days, putting up this note as collateral with the understanding that the Pentuff note should be renewed at the expiration of 90 days, and at maturity of the Carpenter note, Pentuff's note was to be paid, the Pentuff note was not paid. The consideration on my part for the note was: That Mr. Pentuff represented himself to be a preacher, saying he ran a female seminary, saying that he had to take a great many notes in settlement of tuition fees and therefore had to use some of the notes in other banks than those at Charlestown, West Virginia, where his seminary was. I paid Pentuff five hundred dollars in cash and was to refund him the difference when Carpenter's note was paid. It is not a fact that the note in question was delivered to me in pledge by Pentuff as security for money by him borrowed from me. The Carpenter note was the one offered for discount and the Pentuff note was subsequently added only be-

cause of the rule of the bank, that no paper could be discounted when running for more than 90 days, therefore the Pentuff note was made for 90 days and renewed for a like period to mature with the Carpenter note. The Pentuff note has never been paid."

Defendant, called as a witness in his own behalf, was asked the following question: "For what purpose did you give this note sued on in this case?" Plaintiff objected on the ground that "it calls for a conclusion of the witness and is an attempt to vary the terms of a written instrument." The objection was sustained and defendant excepted. He was also asked whether he received anything except three hundred dollars as a consideration of the note, to which objection by plaintiff was sustained, and exception noted, on the alleged ground that it was an attempt to vary the terms of a written instrument. He testified, on cross-examination, that "he never received a notice of protest," and that he "signed the note in question." He gave no further testimony.

Pentuff, payee of the note, was called as a witness for defendant and was asked the following questions: "Did you ever indorse that note to the plaintiff?" To which plaintiff objected that "it called for a conclusion of the witness and tended to vary the terms of a written contract." Objection sustained and exception taken. "Q. Did you ever sell, assign, or transfer that note to the plaintiff in writing?" To which a like objection was made and sustained, defendant excepting. On cross-examination he testified: "Defendant never paid me any part of this note, plaintiff never made any demand upon me for the payment of this note. No part of this note has been paid to me." The foregoing is all the evidence in the case appearing in the transcript.

We will notice the points now urged in defendant's brief. The introduction of the note was objected to on the ground that it had not been indorsed by the payee, and that the only indorsement was to a "bank," etc., which had not indorsed the note to plaintiff. It is contended that the words, "demand, notice, and protest waived," did not constitute an indorsement. In *Loustalot v. Calkins*, 120 Cal. 688, [53 Pac. 258], the words, "waiving notice and protest" above the payee's signature on the back of the note was held to be an indorsement as defined in section 3117 of the Civil Code. (See *Bunker v. Osborn*, 132 Cal. 480, [64 Pac. 853].) The

question here is not whether Pentuff became liable by the indorsement as an indorser or as an assignee, a distinction sometimes arising out of the form of the indorsement. The question is, Did it have the effect to pass title to the holder? Pentuff is not a party to the action and is not concerned in it. An assignment would follow by implication by the mere signature. The writing over the signature does not destroy the assignment which the law imports from the signature *per se*. (1 Daniel on Negotiable Instruments, sec. 688c.) The words preceding the signature were not meant to apply to the indorser. He intended to waive demand, notice, and protest in favor of the holder by virtue of his indorsement. In other words, he in effect assigned the note and waived demand, notice, and protest upon him. (*Hendrix v. Bauhard*, 138 Ga. 473, [Ann. Cas. 1913D, 692, 43 L. R. A. (N. S.) 1028, 75 S. E. 588], cited by respondent.) The indorsement was in blank, i. e., to no particular person, and the note became payable to bearer. (1 Daniel on Negotiable Instruments, sec. 693.) The subsequent indorsement by the Arlington National Bank did not affect plaintiff's right as holder and owner of the note, and that he was the owner and holder was undisputed. He could strike out any subsequent or intermediary indorser. (Id., sec. 694a.) The note was properly admitted in evidence.

It was not error to ask plaintiff when and where the note was assigned to him. The objection was not that the question assumed an assignment made and did not call for the conclusion of the witness. Without objection the witness testified that the note was assigned to him for a valuable consideration and has never been paid. On his cross-examination he explained all the facts, and they were not disputed. When Pentuff was testifying he was asked, "Did you ever indorse that note to the plaintiff?" and "Did you ever sell, assign, or transfer that note to the plaintiff in writing?" These questions were put to the witness upon defendant's theory that the indorsement did not amount in law to a transfer. The witness was not asked whether his signature on the back of the note was genuine. The question called for the opinion of witness whether he had "assigned the note in writing to plaintiff," which called for a conclusion. Counsel could have brought out all the facts, had he so desired, from which the court could have determined whether an assignment had been

made. Furthermore, the fact that Pentuff had indorsed the note as shown was not disputed, and hence it was not allowable for him to testify as to its effect, nor could he under the general denial of assignment, having alleged no matter by way of special defense, call the assignment in question. (*Giselman v. Starr*, 106 Cal. 651, 658, [40 Pac. 8].)

Appellant complains that he was by the ruling of the court deprived of the opportunity to prove by Pentuff that but three hundred dollars was given to him. Counsel says: "Where there is any doubt of the intention of Pentuff in affixing his signature to the back of that note, his testimony ought to have been allowed to clear it up." We do not doubt that the court would have permitted defendant to show by Pentuff just what the transaction was, but no other questions were asked him—the purpose of counsel apparently having been to get from the witness an opinion as to whether what he did amounted to an assignment.

We discover no prejudicial error in the record.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1880. Second Appellate District.—February 15, 1916.]

THE RINDGE COMPANY (a Corporation), Respondent, v.
THE CITY COUNCIL OF THE CITY OF LOS
ANGELES et al., Appellants.

STREET LAW—PROCEEDINGS UNDER ACT OF 1903—OBJECTIONS TO ASSESSMENT—NEGLECT OF CLERK TO PRESENT IN TIME—JURISDICTION OF COUNCIL.—Upon proceedings had under the Street Opening Act of 1903, where the clerk of the city council, through inadvertence or other cause, fails and neglects, as provided by section 19 of such act, to present or lay before the council the assessment and objections filed thereto at the next regular meeting of the council after the expiration of the time for filing such objections, the council has no jurisdiction by the notice so given to act in the premises, but it does not thereby lose jurisdiction of the entire proceeding, and upon a republication of the notice, in accordance with the provisions of section 18 of the act, it has jurisdiction thereafter, upon presentation of the assessment and objections within the required time, to make an order confirming the assessment.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge.

The facts are stated in the opinion of the court.

Albert Lee Stephens, City Attorney, Howard Robertson, Assistant City Attorney, and Charles S. Burnell, Assistant City Attorney, for Appellants.

Edwin A. Meserve, and Shirley E. Meserve, for Respondent.

Hanson, Hackler & Heath, *Amici Curiae*.

SHAW, J.—This is an appeal from a judgment rendered in a proceeding instituted in the superior court of Los Angeles County, whereby it was sought to have certain acts of the city council of the city of Los Angeles, in confirming an assessment made to cover the cost of opening Broadway from Tenth Street to Pico Street, declared null and void for want of jurisdiction.

The writ was issued and upon return thereto a hearing was had, wherein the court caused to be entered a judgment as prayed for by petitioner, declaring said action of the city council void, from which judgment this appeal is prosecuted.

It appears that under the Street Opening Act of 1903 and the several amendments thereto, [Stats. 1903, p. 376], the city council of Los Angeles, in May, 1913, initiated proceedings for the opening of Broadway, a street in said city, from Tenth Street to Pico Street, all of which proceedings up to and including the making of the assessment, plat, and diagram, and the filing of the same with the clerk of the council on December 30, 1914, it is conceded were duly had and taken as provided for by the act. On December 31, 1914, the clerk, as required by section 18 of the act, gave notice by due publication thereof requiring all persons interested in the matter to file with him their objections to the confirmation of the assessment. Within thirty days after the first publication of said notice a number of parties owning property affected by the assessment filed protests and objections thereto with the clerk of the city council, as provided by section 19 of the act; which section also provides that "the clerk shall, at the next regular meeting of the city council after the expiration of the time for filing objections, lay said assessment and all objec-

tions so filed with him before the council; and said council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned, and pass upon such assessment." The next regular meeting after the expiration of the thirty days required for the publication of said notice so given by the clerk was held on the first day of February, 1915, at which time the clerk should have presented the assessment and the objections so filed against the confirmation thereof to the council. Through inadvertence or other cause—the reason not appearing—the clerk, however, failed and neglected to present or lay the assessment and objections before the council at this regular meeting so held on February 1, 1915; but at the meeting next following, he did lay the same before the council, which, assuming jurisdiction to act, proceeded with the hearing of the objections to the assessment so filed, and after ordering certain corrections and modifications thereof made, confirmed the assessment as thus corrected. Thereafter the plaintiff instituted in the superior court a *certiorari* proceeding, No. B-23218, wherein it sought to have the order and action of the city council so had and taken declared null and void. The question there presented, and upon which the court rendered its judgment, appears to have been identical with that involved in the case of *Stoner v. City of Los Angeles*, 8 Cal. App. 607, [97 Pac. 692]. In that case it was held that the publication of the notice required by section 18, pursuant to which objections to the assessment had been filed, in the absence of presentation thereof made by the clerk to the council at its next regular meeting held after the thirty days specified in the notice for filing objections, no action at such meeting having been had by the council as to the hearing of the objections, did not authorize the council, at a subsequent meeting, to act upon said assessment and objections. In rendering judgment upon the application for writ of review in said case hereinbefore referred to as No. B-23218, the court followed the law as laid down in the *Stoner* case, and held that by reason of the clerk's failure to present the assessment and protests to the council at its first regular meeting following the expiration of the thirty days fixed for filing objections, no jurisdiction was conferred upon the council by the notice so given to act in confirmation of the assessment at a subsequent meeting. From this judgment, as to the correctness of

which we entertain no doubt, the council, by resolution, resolved that it would prosecute no appeal, and instructed the clerk to publish the notice required by section 18 of the act. Thereafter, on April 28, 1915, the clerk of the city council, as provided in said section 18, caused to be duly published a new notice requiring all persons interested to file with him their objections, if any they had, to the confirmation of the said assessment, and within thirty days immediately following the first publication of said notice certain protests and objections to the confirmation of the assessment were filed, which, together with the assessment, at the first meeting of the council following the expiration of thirty days from the first publication of the notice, the clerk presented to the council, which proceeded regularly and in accordance with the provisions of the act to hear the protests and objections filed, after which, on June 14, 1915, it made an order confirming the assessment. Thereafter plaintiff instituted this proceeding for *certiorari*, wherein the trial court adjudged the action of the council in making the order confirming the assessment null and void for want of jurisdiction.

The chief contention of respondent and ground upon which it is apparent the trial court based its decision is that by reason of the failure of the clerk to present the assessment and objections thereto at the regular meeting of the council following the publication of the first notice, the council, notwithstanding all steps in the matter prior to such omission of the clerk had been duly had and taken, lost jurisdiction of the entire proceeding, and this notwithstanding the provisions of section 4 of the act under and pursuant to which, it must be conceded, all steps necessary to vest in the council jurisdiction to order the improvement described in the ordinance had been taken. In the *Stoner* case this court, in discussing the failure of the clerk to present the assessment and protests at the first regular meeting following the giving of the notice, said: "The council, having failed to take any action at the next regular meeting after the expiration of the time for filing objections, either in the way of according a hearing or adjourning the hearing to some subsequent day, lost jurisdiction to act in the matter, *except upon a republication of the notice in accordance with the provisions of section 18 of the act.*" While in this excerpt the court expressed its views upon the question now presented, counsel for respondent in-

sist that the language therein which we have italicized was not necessary to the decision of the question presented, and must therefore be regarded as *dictum*. Nevertheless, we are of the opinion that what was *dictum* in that case is the law when applied to the facts presented in the case at bar.

The only question here involved is the validity of the order confirming the assessment. Not until the clerk performed certain duties imposed upon him by law, namely, the due publication of the notice and due presentment of the assessment and protests at the first regular meeting after said publication, was the council authorized to take action in confirming the assessment. The giving of the notice and, within a limited period of time specified therefor, laying the assessment and protests before the council, both ministerial in character, in fact constituted but one act, the performance of which was a necessary prerequisite to any action upon the assessment by the council. By reason of the clerk's neglect to present the assessment and objections thereto, the notice as published could perform no function whatever. In the absence of presenting the assessment to the council at the specified time, the publication of the notice, so far as vesting the council with jurisdiction to act upon the assessment, was as futile for the purpose intended as though notice had not been published at all. Certainly it could not be said as to an order confirming an assessment void for want of proper notice that the council by such vain action had lost jurisdiction of the entire proceeding. Nor did its act, ineffectual by reason of the clerk's neglect, deprive it of jurisdiction to make the order of confirmation when, following due publication of notice within the time required therefor, the clerk presented the assessment and protests thereto for its action. It was then empowered to act as fully upon the second publication of notice as though the first, proving abortive, had never been made. We adhere to what was said by this court in *Stoner v. City of Los Angeles*, 8 Cal. App. 607, [97 Pac. 692], as reiterated in *S. M. Bernard Co. v. City of Los Angeles*, 18 Cal. App. 626, [124 Pac. 88], that by reason of the clerk's neglect to present the assessment and objections to the council at the time in the statute specified therefor, the council had no power to make the order, *save upon a republication of the notice, followed by due presentation of the documents, all of which appears to have been duly and regularly done*. This

is not only in accord with reason, but in line with the principle enunciated by the supreme court in *Bliss v. Hamilton*, 171 Cal. 123, [152 Pac. 303]; *Haughawout v. Percival*, 161 Cal. 491, [Ann. Cas. 1913D, 115, 119 Pac. 649]; *Dougherty v. Foley*, 32 Cal. 403; *Cake v. City of Los Angeles*, 164 Cal. 705, [130 Pac. 723]; *O'Dea v. Mitchell*, 144 Cal. 374, [77 Pac. 1020]; and other cases to the effect that after jurisdiction has been acquired to do the work, abortive attempts by officers to perform acts upon which the taking of other steps in the proceedings depend does not exhaust the power of the officer, within the time fixed therefor, to make good his futile effort by a due performance thereof as fully as though no attempt had been made to perform the act.

It is apparent from what has been said the judgment rendered by the superior court in No. B-23218, involving the validity of the order made under the first publication, did not affect the order made in the exercise of the power conferred by the republication of the notice and proceedings had pursuant thereto. It was correctly rendered upon a state of facts justifying the decision.

The judgment is reversed and the trial court directed to enter judgment affirming the validity of the proceedings attacked.

Conrey, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 15, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 13, 1916.

[Civ. No. 1688. First Appellate District.—February 15, 1916.]

HENRIETTA S. DEAN, Respondent, v. GEORGE W. HAWES, Appellant.

CONTRACT — SALE OF LAND — OPTION TO RETURN — BREACH — RIGHT TO RECOVER PURCHASE MONEY AND INTEREST.—Where on a sale of a certain interest in real property the vendor executed a written agreement to take the land back, if requested by the purchaser, at any time after one year and within two years, and pay the purchaser ten per cent on the investment, in an action by the purchaser for a breach of the contract, a finding in her favor is sustained, where the evidence shows that at or about the expiration of one year from the making of the agreement, and upon several occasions shortly thereafter, plaintiff notified the defendant orally and in writing that she accepted the option to reconvey, and upon each occasion offered to execute a deed conveying to him the lands upon the payment to her of the amount of the original purchase price, and interest for one year at ten per cent, which defendant refused and finally repudiated the obligation; and the fact that subsequent to defendant's repudiation of the agreement, and at or about the time of the expiration of two years, plaintiff again tendered a deed, coupled with a demand for an amount more than that due, will not overthrow the finding.

ID.—DEFINITION OF INVESTMENT.—The word "investment" as commonly employed has been judicially defined to mean the putting out of money on interest in some form more or less permanent so as to yield an income; and such an agreement providing for the payment to plaintiff under certain contingencies of "ten per cent upon the investment," must be construed as an undertaking to pay annual interest at the rate named, and not merely an arbitrary augmentation of the sum received for the land.

ID.—FINDINGS—VALUE OF LAND.—A finding that the value of the land did not at any time after the conveyance thereof exceed the sum of five hundred dollars was not vitally defective in failing to state that the value so found was the market value. The word "value," when applied to property and no qualification is expressed, means the price which the property would command in the open market, and therefore the word as used in the finding must be held to mean market value.

ID.—MEASURE OF DAMAGES.—The measure of the plaintiff's damages is the difference between the sum found due under the agreement and the market value of the land.

ID.—VALUE OF LAND—OPINION OF WITNESS—WAIVER OF OBJECTION.—Error, if any, in sustaining an objection to the opinion of a wit-

ness concerning the value of the land in such a case is cured where the witness was afterward permitted without objection to give his opinion of the value.

ID.—VALUE OF OTHER PROPERTY—WHEN INADMISSIBLE.—The sale price of property other than that in question is not admissible in such a case where it is not shown to be similar in character and situation.

APPEAL from a judgment of the Superior Court of Santa Cruz County. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

George W. Hawes, and Daniel W. Burbank, for Appellant.

Charles B. Younger, for Respondent.

LENNON, P. J.—For the second time this case comes to this court upon appeal by the defendant from a judgment in favor of the plaintiff.

The action was for damages for the alleged breach of a contract to purchase real estate. Upon the first appeal the judgment was reversed because the plaintiff failed to show that she had been damaged by the alleged breach of the contract in the sum sued for or in any other sum.

The plaintiff's cause of action rests upon allegations of fact which are substantially as follows: The defendant, in consideration of the sum of eight hundred dollars, executed to plaintiff a deed dated October 31, 1908, purporting to convey to plaintiff the defendant's undivided one-half interest in certain real property situate in the county of Santa Cruz. The plaintiff has ever since been the owner in fee of the interest so conveyed to her free and clear of all encumbrances. Contemporaneously with the execution of the deed referred to the defendant made and delivered to plaintiff the following memorandum of agreement:

“Santa Cruz, Cal., October 31, 1908.

“This is to certify that I have this day sold to Henrietta S. Dean a one-half interest in a certain tract of land; Now therefore, should she so desire I hereby agree to take the land back, allowing her ten per cent on the investment, at any time after one year and within two years from this date. The party owning the other half interest is W. H. Lamb, the amount is six acres.

“(Signed): GEORGE W. HAWES.”

On November 1, 1909, the plaintiff accepted the option of reconveying to the defendant the land described in the defendant's deed and memorandum of agreement of October 31, 1908, by so informing the defendant, and at the same time offered to make a deed to the property to the defendant upon the payment of the sum of eight hundred and eighty dollars, which it was alleged was the aggregate of the original purchase price plus interest for one year at the rate of ten per cent per annum.

Upon the second trial of the case the court below, among other things, found as follows: "That after one year from the execution of said deed and of the instrument set forth in paragraph IV of the amended complaint herein, and on or about November 1, 1909, said plaintiff notified said defendant that she was desirous of accepting, and did accept the option or agreement to reconvey to said defendant the premises hereinbefore described, and offered in good faith to said defendant to execute to him a deed to the undivided half of said premises upon payment or tender to said plaintiff by said defendant of the sum of eight hundred and eighty dollars, and that said plaintiff then and there offered to convey said premises to said defendant upon the payment by said defendant to said plaintiff the sum of eight hundred and eighty dollars, and said plaintiff then and there demanded that said defendant pay to said plaintiff said sum of eight hundred dollars together with the sum of eighty dollars interest thereon; that thereafter and from time to time said plaintiff offered to execute such deed to said defendant, and demanded of him that he repay to said plaintiff said sum of eight hundred dollars together with interest thereon.

"That defendant declined and refused to accept the offer of said plaintiff or to pay said plaintiff the sum of \$800, or any part or portion thereof, or any interest thereon, and declined and refused the offer of said plaintiff to reconvey said premises to said defendant."

This finding is assailed upon the ground that it is not supported by the evidence, but is contrary thereto in the particular that it finds that the defendant refused to accept the plaintiff's offer to reconvey the property in question to the defendant upon the payment by him to the plaintiff of the sum of \$880; whereas the evidence, it is claimed, shows that the plaintiff offered to reconvey only upon the condition that

the defendant pay to the plaintiff the sum of \$960, which, it is insisted, was eighty dollars in excess of the sum called for by the terms of the agreement in the event that the plaintiff accepted the option contained therein.

The record contains some evidence to the effect that at or about the expiration of one year from the making of the agreement, and upon several occasions shortly thereafter, the plaintiff notified the defendant orally and in writing that she accepted the option to reconvey, and upon each occasion offered to execute a deed conveying to him the said lands upon the payment to her of the sum of \$880, which aggregated the original purchase price of \$800 and interest thereon for one year at ten per cent, and that the defendant upon each occasion refused to accept the plaintiff's offer, and finally repudiated any obligation on his part under the agreement.

This evidence, we think, fully sustains the finding of the trial court; and the fact that subsequent to the defendant's repudiation of the agreement, and at or about the time of the expiration of the two years provided in the agreement, the plaintiff through her agent tendered to the defendant a deed to the property, coupled with a demand for \$960, will not under our construction of the agreement in question avail to overthrow the findings made upon the theory that the sum finally demanded was eighty dollars in excess of the sum required to be paid by the defendant upon the plaintiff's acceptance of the option provided for therein.

The word "investment" as commonly employed has been judicially defined to mean the putting out of money on interest in some form more or less permanent so as to yield an income. (*Savings Bank of San Diego County v. Barrett*, 126 Cal. 413, [58 Pac. 914].) Consequently the agreement of the defendant to pay to the plaintiff under certain contingencies "ten per cent upon the investment," if the idea suggested by the word "investment" is to be carried out, must be construed as an undertaking to pay annual interest at the rate named, and not a mere arbitrary augmentation in the sum received for the land. If the latter construction were followed, the plaintiff would receive no more upon an "investment" covering a period of two years than upon one extending over only half that length of time—a construction which appears to us to be at variance with the language used. The

sum of \$960 ultimately demanded from the defendant upon the tender of the deed was the aggregate of the original purchase price and the stipulated interest thereon for two years, and was, therefore, not in excess of the terms of the defendant's agreement.

The finding of the trial court that the value of the land did not at any time after the conveyance thereof exceed the sum of five hundred dollars was not vitally defective in failing to state that the value so found was the market value. The word "value," when applied to property and no qualification is expressed, means the price which the property would command in the open market, and therefore the word as used in the finding must be held to mean market value. (*In re McGhee's Estate*, 105 Iowa, 9, [74 N. W. 695]; *Little Rock etc. Ry. Co. v. Woodruff*, 49 Ark. 381, [4 Am. St. Rep. 41, 5 S. W. 792].)

The finding last referred to, however, does not fully support the further finding that the plaintiff was damaged by the defendant's breach of his agreement in the sum of six hundred dollars. If the land had a market value of five hundred dollars, then the measure of the plaintiff's damage would be the difference between that sum and the sum of \$960, which the court in effect found was ultimately due from the defendant. (*Dean v. Hawes*, 21 Cal. App. 350, [131 Pac. 885].) So measured, the plaintiff's damage under the facts found should not have exceeded the sum of \$460, and therefore the findings will not support a judgment in any greater amount.

The error, if any, in the trial court's ruling sustaining an objection to the opinion of the defendant's witness Archibald concerning the value of the land, was subsequently cured when the witness without objection was permitted to give his opinion of the value.

There was no error in the ruling of the trial court refusing to permit the defendant's witness Williams to give in evidence the sum for which the Wise property sold. The objection that this particular property was not shown to be similar in character and situation to the land in controversy was well taken and rightfully sustained.

This disposes of all the points made in support of the appeal which we deem worthy of discussion.

For the reasons stated the judgment appealed from is modified by striking therefrom all in excess of the sum of \$460, and as so modified it will stand affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1950. Second Appellate District.—February 15, 1916.]

JOHN CASTERA, Petitioner, v. THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES and FRANK G. FINLAYSON, Judge Thereof, Respondents.

IMPRISONMENT IN STATE'S PRISON—EFFECT ON CIVIL RIGHTS.—Under section 673 of the Penal Code, a sentence of imprisonment in a state prison for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment.

ID.—RIGHT TO SUE CONVICT.—Even where conviction of a felony results in civil death (as it does in this state upon a sentence of imprisonment for life), the weight of authority is apparently in harmony with the English doctrine to the effect that the convict still remains subject to be sued.

ID.—IMPRISONMENT OF PLAINTIFF IN PENITENTIARY—RIGHT OF DEFENDANT TO PROCEED—MANDAMUS.—Notwithstanding the imprisonment of the plaintiff in a civil action in the state prison, upon the conviction of a felony, after the filing by him of a complaint in the civil action, the defendant in the action has the right to have the action proceed, and upon the court's refusal to proceed with the case, *mandamus* will issue to compel it.

APPLICATION originally made in the District Court of Appeal for the Second Appellate District for Writ of *Mandamus* to compel respondents to restore a civil action to the calendar of the court and to proceed and determine the same.

The facts are stated in the opinion of the court.

Slosson & Mitchell, for Petitioner.

Henry W. Nisbet, for Respondents.

CONREY, P. J.—*Mandamus.* There is now pending in the Superior Court of the county of Los Angeles and in the de-

partment thereof presided over by the respondent judge, an action in which one J. E. Youtz is plaintiff and the petitioner is one of the defendants. Petitioner and other defendants in that action, having been duly served with summons, filed a demurrer to the complaint. After the filing of his complaint, the plaintiff Youtz was imprisoned in the state penitentiary pursuant to his conviction of a felony, and is now undergoing a three years' term of imprisonment. On account of such imprisonment of the plaintiff, the respondent judge has ordered said demurrer stricken from the calendar and refuses to hear and determine the same or proceed further in said cause. The petitioner seeks a peremptory writ of *mandamus*, commanding that said cause be restored to the calendar of said court and that the court proceed to hear and determine the same.

To this petition a general demurrer is filed, alleging that the petition does not state facts sufficient to entitle the plaintiff to the relief sought by him. It is understood by the parties that our determination of this demurrer is to dispose of the case without further hearing. Permission was granted respondents' counsel to file a brief in support of the demurrer, but no brief has been presented.

"A sentence of imprisonment in a state prison for any term less than for life suspends all the civil rights of the person so sentenced and forfeits all public offices and all private trusts, authority, or power during such imprisonment." (Pen. Code, sec. 673.) We are not aware of any decision covering the precise question involved in this matter. It is stated that even where conviction of a felony results in civil death (as it does in this state upon a sentence of imprisonment for life), the weight of authority is apparently in harmony with the English doctrine to the effect that the convict still remains subject to be sued. (8 Ruling Case Law, p. 707, and citations there found.) This doctrine is specifically recognized in this state in the statutory provisions allowing a divorce to be granted upon proof that defendant has been convicted of a felony.

To say that a defendant in a civil action is obliged to submit to the continued pendency of an action against him under these circumstances, because the plaintiff is undergoing a sentence of the kind herein described, would be to impose upon the defendant a punishment for the plaintiff's crime. The sentence might be for a long term of years and all of defend-

ant's property might be subject to an attachment in the action, and yet the defendant would be without relief, no matter how groundless in fact the action might be. This cannot be the law. The interests of the plaintiff in such an action will ordinarily be sufficiently protected by the vigilance of the attorneys who have charge of his case; but if in any case he is not so protected, the loss should fall upon him rather than upon those unconnected with his offense.

Let the peremptory writ issue as demanded.

James, J., and Shaw, J., concurred.

[Civ. No. 1554. First Appellate District.—February 16, 1916.]

D. L. HEALY, Respondent, v. W. H. OBEAR, Appellant.

APPEAL—ORDER DISMISSING MOTION FOR A NEW TRIAL—INSUFFICIENT RECORD—CONFLICTING EVIDENCE.—On an appeal from an order dismissing a motion for a new trial on the ground of lack of prosecution, where there is no properly authenticated record on appeal, and especially where the record shows that the order appealed from was made after a hearing in which the evidence presented by parties was conflicting, the action of the lower court will not be disturbed.

ID.—APPEAL FROM JUDGMENT—MATTERS REVIEWABLE.—Where an appeal from a judgment is not taken within sixty days from its entry, the appellate court is confined to examination of the judgment-roll alone.

ID.—CONTRACT—EMPLOYMENT OF REAL ESTATE BROKER—IMPROPER DESCRIPTION OF PROPERTY—STATUTE OF FRAUDS.—A contract employing a broker to sell real property is not void because the description of the property which the broker was employed to sell is insufficient under the statute of frauds.

ID.—PLEADING—STATUTE OF FRAUDS.—In an action by a real estate broker to recover his compensation, where the defendant does not plead the statute of frauds nor deny the contract in his answer, but, on the contrary, sets up the contract and alleges that it was the agreement entered into by the parties, he cannot on appeal maintain that the contract was void under the statute of frauds.

ID.—STATUTE OF FRAUDS—DENIAL OF CONTRACT.—It is not essential that one seeking the protection of the statute of frauds must specially insist upon it in his pleadings further than to deny the execution of the contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order dismissing defendant's motion for a new trial. Stanley H. Smith, Judge presiding.

The facts are stated in the opinion of the court.

Harold Ide Cruzan, and Vincent Surr, for Appellant.

James G. Maguire, E. T. Barrett, and A. E. Clausen, for Respondent.

KERRIGAN, J.—This is an appeal by defendant from a judgment against him and from an order dismissing his motion for a new trial. The action is to recover for services rendered by plaintiff to defendant as a real estate broker.

Through the neglect of the attorney who was representing the defendant when the appeal was taken, the record is not in such form as to present the points relied upon. In one aspect of the case the defendant seems to be attempting to appeal from an order denying his motion for a new trial. No such order was ever made in the case; consequently no such appeal is before us. The motion for a new trial was dismissed upon the ground of lack of prosecution. Defendant appeals from that order, but has not brought to this court any properly authenticated record upon which it can be reviewed. Moreover, it is apparent from the record which the defendant has presented that the order dismissing the motion was made after a hearing in which the evidence presented by the parties was conflicting—which furnishes an additional reason why this court cannot disturb the action of the court below.

Turning to the appeal from the judgment, it was not taken within sixty days after its entry, the consequence of which is that in its consideration we are necessarily confined to an examination of the judgment-roll. It is claimed by the appellant that at least one point is presented thereby upon which this court should reverse the judgment, viz., that the description of the property (for the sale of which the plaintiff recovered his compensation) is insufficient under the statute of frauds—such defect appearing from the contract as pleaded in the answer to the complaint and as set forth in the findings of the court. We do not think that the contract is void for the reason assigned by appellant; but however that

may be, we are satisfied that he is in no position, in view of the condition of the pleadings, to avail himself of that point. The answer did not specially plead the statute of frauds; and it is the accepted rule in this state that one seeking the protection of that statute must specially insist upon it in his pleadings. The reason for the rule is obvious. A parol agreement is neither illegal nor void; and the statute of frauds requiring a contract to be in writing is simply a weapon of defense, which the party entitled thereto may or may not use. (9 Am. & Eng. Ency. of Pl. & Pr. 705.) If the defendant in his answer had denied the contract on which plaintiff relies, then the question of its validity under the statute would perhaps have been raised. (*Feeney v. Howard*, 79 Cal. 525, [12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984].) This he did not do, but, on the contrary, set up the contract in his answer, and alleged that it was the agreement entered into by the parties. Not having claimed the benefit of the statute, he must be considered "as waiving its protection, and as furnishing by his answer the very proof which the statute requires." (*Burt v. Wilson*, 28 Cal. 632, [87 Am. Dec. 142]; *Jamison v. Hyde*, 141 Cal. 109, 112, [74 Pac. 695].)

Judgment and order affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 16, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 12, 1916, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision of the district court of appeal of the first district, we deem it proper to say that we do not understand that it is essential that one seeking the protection of the statute of frauds must specially insist upon it in his pleadings further than to deny the execution of the contract. The district court of appeal opinion concedes that had the defendant in his answer denied the contract on which plaintiff relies, the question of its validity under the statute would have been raised. (*Feeney v. Howard*, 79 Cal. 525.)

The application for a hearing in this court is denied.

[Civ. No. 1729. Second Appellate District.—February 16, 1916.]

**R. B. GUERNSEY, Respondent, v. JOHNSON ORGAN AND
PIANO MANUFACTURING COMPANY, Appellant.**

ACCOUNT — ASSUMPTION BY ANOTHER — INSUFFICIENCY OF EVIDENCE TO SHOW.—In an action to recover on an account for goods sold to a third party, it being contended that the defendant assumed the obligation, the evidence is insufficient to sustain a finding in favor of the plaintiff, where it consisted solely of a letter written by the secretary of the company to the plaintiff, stating in substance that defendant would be glad to settle its general account with plaintiff, after the allowance of a certain credit, and, referring to the particular account sued on, saying that the difficulty with it was in the agency agreement between plaintiff and the original debtor, out of which the account grew, but that defendant was attending to the obligations of the latter company and expected to take care of this one, the letter indicating, however, some controversy between the parties and a difference of understanding regarding the agency contract.

ID.—CORPORATION LAW—AUTHORITY OF SECRETARY.—The secretary of a corporation has no inherent power to assume any obligation on behalf of the corporation, or agree without any consideration whatsoever to bind the corporation to pay the debt of another.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge.

The facts are stated in the opinion of the court.

Frank Bryant, for Appellant.

Hardy, Wheeler & Hardy, for Respondent.

SHAW, J.—Defendant, a corporation, appeals from the judgment in favor of plaintiff, presenting the record by bill of exceptions.

It appears, as found by the court, that "the Murray M. Harris Company became indebted to the plaintiff for goods sold and delivered in the sum of \$497.50, and that thereafter on the 18th day of December, 1913, . . . the defendant, Johnson Organ & Piano Manufacturing Company, in writing assumed and agreed to pay the same to this plaintiff." The only evidence whatever offered in support of



this finding was a letter dated December 16, 1913, addressed to plaintiff, signed "Johnson Organ & Piano Mfg. Co., by A. E. Streeter, Secretary," wherein he said:

"Your favor of the 10th inst. received. Regarding our account with you, we shall be more than glad to make settlement as soon as the proper adjustment and agreement on our account can be reached. In the first place, the statement rendered by you on the 10th does not contain a credit of \$63.60 to which we are entitled. We have also returned some blowers to your local warehouse and are holding their receipt for same, but have not as yet received proper credit. At such time we shall be glad to make final settlement with you.

"The difficulty in this account has been through an agency agreement between your company and The Murray M. Harris Co. which we took over at the time we took over The Murray M. Harris Co. business. We are attending to all obligations of The Murray M. Harris Co. and expect to take care of this one. This agency agreement has never been well defined, and your Mr. Cochran views same in a light different to that which we were led to understand. Please render us a statement containing the credits of which we have spoken and we shall be glad to settle with you immediately."

No corporate seal was attached to this letter, and with reference thereto Streeter testified: That he caused the same to be written, and signed the corporate name thereto; that he was secretary and a director of defendant; that the letter was written as a means devised by himself of assisting the Murray M. Harris Company to extend its indebtedness. The letter, in our opinion, is wholly insufficient to justify the finding made by the court. Plaintiff's letter of the 10th, receipt of which is acknowledged, was not offered in evidence. The letter at most merely shows that defendant had taken over the Murray M. Harris Company, which was a debtor of plaintiff in some amount not shown; that defendant was *attending* to all obligations of the Murray M. Harris Company and expected to take care of this one. What this one does not appear. It also shows there was some controversy existing between defendant and plaintiff with reference to the accounts between them and a difference of understanding regarding some agency contract

out of which the indebtedness of the Harris company had grown. Moreover, the promise made to "settle with you immediately" was not with reference to the Murray M. Harris Company matter, but as to an indebtedness due from defendant directly to plaintiff. Aside from this, however, is the fact that Streeter, as secretary, had no inherent power to assume any obligation on behalf of defendant, or agree without any consideration whatsoever, as appears here, to bind defendant to pay the debt of another. No express authority whatever is shown in Streeter; nor is it shown by a scintilla of evidence that he had any ostensible authority to act in the matter. (See *Black v. Harrison Home Co.*, 155 Cal. 121, [99 Pac. 494]; *Bonner Oil Co. v. Pennsylvania Oil Co.*, 150 Cal. 658, [89 Pac. 613]; *Read v. Buffum*, 79 Cal. 77, [12 Am. St. Rep. 131, 21 Pac. 555]; *Thomasson v. Grace M. E. Church*, 113 Cal. 558, [45 Pac. 838]; 3 Cook on Corporations, 6th ed., sec. 717.) It is true, as claimed by respondent, that "a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." (Civ. Code, sec. 1589.) There is nothing in the record, however, which in the slightest degree indicates that defendant was benefited by the transaction, or accepted any benefits thereof. Indeed, the cause of action is based solely upon the letter without any other showing whatsoever.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 342. Third Appellate District.—February 16, 1916.]

In the Matter of the Application of FRANK S. WILSON for
a Writ of Habeas Corpus.

CRIMINAL LAW — CONDITIONAL COMMUTATION OF SENTENCE — POWER OF GOVERNOR. — The constitution makes no distinction between the power of the Governor to grant pardons and to commute sentences, and in either case he has the power to attach such conditions as he may think proper, and the condition that a commutation shall be void if the party thereafter be convicted of a felony is valid.

APPLICATION originally made to the District Court of Appeal of the Third Appellate District for a Writ of Habeas Corpus.

Frank S. Wilson, *in pro. per.*, for Petitioner.

No appearance for Respondent.

THE COURT.—It appears from the petition that petitioner was, in the month of June, 1902, convicted of the crime of robbery and sentenced to undergo imprisonment for the term of his natural life, in the state prison at Folsom; that, on March 19, 1909, the Governor of the state commuted the sentence “from the serving of his natural life, to serve 6 years, 9 months and 3 days, or from June 16, 1902, to March 29, 1909”; that the order of commutation of said sentence contains the following provision: “Now, therefore, I, J. N. Gillett, governor of the state of California, . . . do hereby commute the sentence of the said Frank S. Wilson . . . provided that if said Frank S. Wilson shall thereafter be convicted of any felony, this commutation shall become void, and in addition to the sentence imposed for such felony, he shall serve the remainder of the sentence cut short by this order.”

By section 1, article VII, of the constitution, “The Governor shall have the power to grant reprieves, pardons, and commutations of sentence, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he may think proper.” It was held in *Ex parte Marks*, 64 Cal. 29, [49 Am. Rep. 684, 28 Pac. 109], that the Governor is authorized to grant pardons upon conditions stated which may be defeated

by a breach of such conditions. In a note to *State v. McIntire*, 59 Am. Dec. 566, 572, 576, numerous cases are cited showing that it is well settled that the executive may grant conditions to a pardon. Such conditions as the following are among others which may be imposed: That the prisoner refrain from the use of intoxicating liquors; that he shall use all proper exertions to support his mother and sister; that he shall not be convicted of any offense against the criminal laws of the state. Cases are cited where it was held that if the prisoner fails to perform the condition, the original sentence remains in full force and may be carried into execution.

The constitution makes no distinction between the power to grant pardons and commutations of sentence. The rule above stated applies equally to pardons and commutations of sentence.

The writ is denied.

[Civ. No. 1747. First Appellate District.—February 17, 1916.]

P. J. O'BRIEN et al., Appellants, v. ANNIE REARDON et al., Respondents.

ACTION TO SET ASIDE DECREE OF DISTRIBUTION — FRAUD — PRIOR PROCEEDING FOR LETTERS—RES ADJUDICATA.—A decree denying an application for letters of administration upon an estate which had been finally settled and the property distributed, based upon the ground that the court by false testimony was deceived as to the character of the distributed property, is *res adjudicata* as to a subsequent action brought by the applicant for letters to set aside and vacate the decree of distribution upon the same ground.

ID.—CHARACTER OF PROPERTY—SUFFICIENCY OF EVIDENCE.—In this action to vacate a decree of distribution on the ground that fraud was committed upon the court as to the character of the distributed property, it is held that the evidence warranted the conclusion that the property claimed by the plaintiffs to be the separate property of the deceased was in fact the community property of the deceased and her husband.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

J. C. Black, for Appellants.

A. A. Caldwell, for Respondents.

LENNON, P. J.—The plaintiffs, P. J. O'Brien and Harold Costello (a minor, acting through his guardian *ad litem*), bring this suit for the purpose of having vacated and set aside a decree of the probate court of the county of Santa Clara distributing to Annie Reardon, in the matter of the estate of Annie Nelson, deceased, the real property described in the complaint. Annie Reardon, a daughter of said deceased, and C. O. Nelson, the surviving husband, are made defendants; and it is charged that they "entered into a conspiracy by fraud and falsehood to capture the said property, and with the intent by fraud and falsehood to defraud the plaintiffs out of their lawful interest as heirs at law in the estate of Annie Nelson, deceased"; that to accomplish their ends they "alleged, asserted, and gave out that the whole of the property of Annie Nelson deceased was community property," knowing such assertion to be untrue; that the defendant Nelson, claiming it to be community property while knowing that it was the separate property of his deceased wife, made a conveyance to his codefendant of his title and interest therein as surviving husband; that the latter, as administratrix of the estate, caused it to be inventoried and returned to the probate court as community property, and petitioned the court for its distribution to herself as the grantee of the surviving husband of the deceased; that Annie Reardon, by false testimony, deceived the court and obtained from it the decree of distribution in question.

The defendants answered, denying the allegations of fraud, asserting that the property in question was in fact the community property of the spouses; that the decree of distribution which the plaintiffs attacked not having been appealed from, was *res adjudicata*, and had been so held by the supreme court of this state in a proceeding brought by the plaintiff O'Brien, in which practically the same allegations as to its invalidity had been made as in the present suit.

The matter came on for trial, and the plaintiffs introduced their testimony, at the conclusion of which the defendants

moved the court for a nonsuit upon various grounds, viz., that the plaintiffs had failed to prove that they had any title or interest to the property described in the complaint; that they had failed to prove any fraud in the procurement of the decree of distribution sought to be vacated; that the evidence introduced by the plaintiffs failed to show that the said property was the separate estate of Annie Nelson, deceased; and, finally, upon the ground that the questions involved were also *res adjudicata* by virtue of a second proceeding in the probate court of the county of Santa Clara brought by said P. J. O'Brien praying for letters of administration upon the said estate to be issued to him.

Defendants' motion for nonsuit was granted in general terms, and judgment entered thereon. Defendants appeal from the judgment, and from orders of the trial court denying (1) a motion to correct their notice of intention to move for a new trial, and (2) their motion for a new trial.

So far as previous litigation in the matter of this estate is concerned, the record shows that Annie Nelson, wife of the defendant C. O. Nelson, died in the county of Santa Clara in February, 1910. Thereafter the defendant Annie Reardon, a daughter of the deceased, applied for and was granted letters of administration upon her estate. An inventory of the property of the estate was filed, which included the real estate involved in this action, but which was stated to be the community property of the deceased and her surviving husband. The latter executed to the administratrix a conveyance of his title and interest in said real property, and in the decree of distribution subsequently entered it was distributed to the administratrix as such grantee. No appeal was taken from said decree, and it is now in full force and effect.

Subsequently, and in December of the same year, the plaintiff herein, P. J. O'Brien, applied to the same probate court for letters of administration upon the estate of Annie Nelson, deceased, alleging that the real property already distributed to Annie Reardon in the proceeding above mentioned was in fact the separate property of the deceased and not community property, and that the court had been imposed upon by the fraudulent representations of said Reardon. The defendants herein filed a contest to said petition, and, after a trial of the questions involved, the probate court denied the petition, and found and decreed that the said real property was the com-

munity property of the deceased and her surviving husband, and that the decree of distribution theretofore made was legal, valid, and binding upon the plaintiffs herein as heirs at law of the deceased. Upon appeal by O'Brien the supreme court affirmed this second decree, and incidentally held that the decree previously entered not having been appealed from, was valid and binding upon plaintiff O'Brien and other heirs at law. (*O'Brien v. Nelson*, 164 Cal. 573, [129 Pac. 985].)

Upon the trial of this cause the facts above narrated appeared in evidence, and testimony was also introduced upon the question of whether the real estate in suit was the separate property of the deceased or community property.

As to the plaintiff O'Brien, it is immediately apparent that the motion for a nonsuit was properly granted upon the ground that the questions upon which his right to recover depend are *res adjudicata* by virtue of the prior proceeding brought by him and finally decided against him in the supreme court. It also seems clear that, if in fact the real property involved in this proceeding was the community property of Annie Nelson and C. O. Nelson, and that the testimony introduced in the plaintiffs' case so showed, then the allegations of fraud with which the complaint is so plentifully besprinkled fall of their own weight, and that neither of the plaintiffs made out any case.

From the evidence so introduced it was shown that the deceased in the year 1880 (her name at that time being Annie O'Brien) was a widow with three young children, earning her living by taking in washing. She became acquainted with the defendant Nelson, whom she subsequently married. In 1882, with the help of one hundred dollars borrowed from Nelson, she opened a small workingmen's boarding-house with a saloon attached at Second Street and Broadway in Oakland. In this venture she met with but indifferent success, for just prior to her marriage the following year she borrowed from Nelson a further sum of two hundred dollars, which was used in the furnishing of the boarding-house, of which, although consisting of only eight rooms, two were still completely unfurnished. Upon their marriage it was agreed between Nelson and his wife that the loan of three hundred dollars should not be repaid, but that whatever they possessed should be lumped together and considered as the family or community property.

Shortly after his marriage Nelson obtained employment at \$75 per month, his duties consisting of lighting the street lamps in the evening and extinguishing them in the early morning. During part of the day he tended bar in the saloon and helped around the house. His wages were regularly turned over to his wife (who, in the language of the testimony, "carried the purse"), and were by her placed with the money received from the boarding-house and saloon, all expenses, both of the family and the business, being paid from such common fund. In 1884 a fire occurred in the saloon and boarding-house which destroyed part of the furniture. From an insurance company five hundred dollars was collected on account of this loss. At this time the Nelsons removed from Oakland to East San Jose, and purchased part of the real estate involved in this suit, the price of which was one thousand six hundred dollars. Five hundred dollars was paid down, and a note secured by mortgage given for the balance. From this time on Mrs. Nelson, whose health was not as robust as formerly, did no more work other than attending to her household duties. On the other hand, Mr. Nelson was continuously employed. Part of the property so purchased was subsequently sold; there is evidence of the mortgage being paid off, and of a subsequent mortgage being taken on the property, which in turn was satisfied with money earned by Nelson. At the time of the purchase of the property the deed was taken in the name of Mrs. Nelson, and the *habendum* clause therein stated that the land was bought with the separate funds of the grantee and was to be held as her separate property, but this was done in the absence of her husband and unknown to him, and he never consented thereto. However, upon a subsequent exchange of part of this property for other land, the deed, although taken in the name of Mrs. Nelson, contained no clause designating it as her separate property; and it may also be mentioned that these deeds were taken at a time when the presumption of law prevailed that real property taken in the name of either spouse was community property. The remainder of the real property involved in this proceeding, consisting of lots in the county of Santa Cruz, was acquired by the spouses during coverture by purchase. All taxes on all the real estate were paid by money earned by Nelson, and the land was always assessed in his name. He

never heard his wife claim that the property was other than community in character, and he always so regarded it.

With this evidence in the record upon the submission of the plaintiffs' case we think the trial court was entirely warranted in reaching the conclusion that the real property claimed by the plaintiffs to be the separate property of Annie Nelson, deceased, was in fact the community property of the deceased and her husband; that consequently the plaintiffs had failed to make out any case, and that their motion for nonsuit was properly granted.

If, as we hold, the nonsuit was correctly granted, it follows that the court did not err in denying the plaintiff's motion for a new trial, based as it was upon the insufficiency of the evidence to sustain the decision; and that, even if we assume that the plaintiffs' motion to amend their notice of intention to move for a new trial should have been granted, they suffered no prejudice by its denial.

The judgment and orders are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 14, 1916.

[Civ. No. 1676. First Appellate District.—February 18, 1916.]

GEORGE E. EVANS, Respondent, v. EDW. B. HINDES,
Appellant.

CONTRACT—BROKER'S COMMISSION—MANNER OF PAYMENT—CONSTRUCTION.—Where a written contract, employing a real estate broker to effect an exchange of properties, provided for payment of a certain sum to the broker, and from the record it appears that after the negotiations for the exchange of properties were completed the defendant informed the broker that he would have to wait until a crop of potatoes belonging to him was harvested, which was agreed upon, and the parties then entered into a written addition to the agreement providing that when the crop was sold "the proceeds to the amount of \$1,650 is to be turned over to me in liquidation of above indebtedness," the quoted language of the contract was

merely a limitation upon the amount of money to be paid to the broker from the proceeds of the crop, and where the crop sold for less than the amount of the broker's commission, the latter was entitled to recover the difference from the defendant.

APPEAL from the judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Perry Evans, for Appellant.

Olin L. Berry, for Respondent.

THE COURT.—The plaintiff, as assignee of E. J. Davis, a real estate broker, sues to recover a sum which he claims as a balance due upon a commission for effecting an exchange of properties for the defendant.

It is conceded that Davis was entitled under the contract as written to a commission for his services amounting to the sum of \$1,650, but it is contended by the defendant that Davis agreed to accept in liquidation of his claim the proceeds of a certain potato crop, and that such proceeds having been turned over to him, the obligation under the contract was discharged, although Davis received only the sum of \$670 as such proceeds.

The contract for the broker's commission is in the usual form and subscribed by the defendant. Immediately following it, and apparently on the same sheet of paper, and doubtless executed on the same day, is the following addenda:

"I, the undersigned, accept the above employment, and agree to extend the time of payment until such time as the crop is harvested, it being mutually understood that when the crop is sold, the proceeds to amount of sixteen hundred fifty (\$1650.00) dollars is to be turned over to me in liquidation of above indebtedness.

"E. J. DAVIS."

From the record it appears that after the negotiations for the exchange of properties were completed, Davis and the defendant discussed and agreed upon the amount of the former's compensation. The amount being agreed upon, and the written form of contract providing that it should be payable upon the consummation of the exchange, the defendant informed Davis that unless he received some money from a certain

source, he would be unable to settle with Davis promptly, and that the latter would have to wait until he had harvested a crop of potatoes belonging to him, which would be in about sixty days. This was satisfactory to the broker, and the above quoted addition to the contract was signed. There seems to have been a further conversation concerning the time Davis should receive the amount of his commission, during which conversation it transpired that the defendant had been offered two thousand dollars or two thousand five hundred dollars for his potato crop. At this time apparently both parties expected that the proceeds from the crop would exceed the amount of the commission, so that a part of them would be payable to the defendant. Davis, according to his testimony, was not informed as to the proportionate interest in this crop owned by the defendant—which in fact was but one-fifth.

If there is any ambiguity in the memorandum regarding the payment to Davis of the proceeds of the crop, so as to make it susceptible of the construction contended for by the defendant, this ambiguity is removed, we think, by the testimony of the circumstances under which it was entered into, which strongly support the contention of the plaintiff that the language, "the proceeds to amount of \$1,650 is to be turned over to me in liquidation of above indebtedness," was merely a limitation upon the amount of money to be paid to Davis from the proceeds of the crop—which interpretation also more readily accords with the natural and ordinary meaning of the words used than that contended for by appellant. It further appears that the appellant was disappointed with the trade he had made, so that a construction of the agreement which would diminish his liability would be more apt to suggest itself to him than to a disinterested reader of the language employed. Defendant had agreed to pay his broker \$1,650, and the language of the memorandum above quoted cannot, in our opinion, be fairly construed as an agreement on the latter's part to accept less than this amount.

The judgment is affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on March 17, 1916.

[Civ. No. 1712. Second Appellate District.—February 18, 1916.]

J. L. ROBERTSON, Respondent, v. GEORGE A. BALLOU, Appellant.

APPEAL—BRIEFS—CONSTRUCTION OF SECTIONS 953A, 953B, 953C, CODE OF CIVIL PROCEDURE.—On an appeal from a judgment, where the record is presented as provided by sections 953a, 953b, and 953c of the Code of Civil Procedure, under the latter section, in filing briefs on appeal, the parties must print in the briefs, or in a supplement appended thereto, such portions of the record as they may desire to call to the attention of the court.

PROMISSORY NOTE — CONSIDERATION — INNOCENT PURCHASER—INSTRUCTION.—In an action on a promissory note, negotiable in form, and payable to the order of the defendant, who indorsed and delivered it in purchase of certain corporation stock, in which sale the seller gave an option to the purchaser of returning the stock within a certain time, which option it does not appear was ever exercised or the stock returned or offered for return, and there is nothing in the record to show that the note was executed without consideration or procured by fraud, it is not error for the court to refuse to instruct the jury that the burden of proof rested upon plaintiff to show that he purchased the note without knowledge that it was obtained by fraud or without consideration.

APPEAL from a judgment of the Superior Court of Tulare County. J. A. Allen, Judge.

The facts are stated in the opinion of the court.

Farnsworth & McClure, for Appellant.

Edwards & Smith, and J. S. Clack, for Respondent.

SHAW, J.—Action to recover upon a promissory note. In accordance with the verdict of a jury which tried the case, judgment was entered for plaintiff, from which defendant appeals.

The record is presented as provided for by sections 953a, 953b, and 953c of the Code of Civil Procedure, the latter of which provides that “in filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.” Appellant makes no attempt to

comply with this provision, but suggests that the court read all of the testimony, which it is claimed "sustains appellant's position in every particular." Notwithstanding appellant's failure to direct our attention to any evidence supporting his contention, we have made an examination of the record sufficient to satisfy us that his claims of error committed by the court in the trial are without foundation.

The note was dated May 27, 1913, negotiable in form, and made payable one year after date to the order of the defendant, who indorsed and delivered the same in the purchase of shares of stock in a corporation known as the Big Four Electric Company. The sale of the stock appears to have been negotiated by one Avery, who at the time of the purchase thereof by defendant gave him a written agreement as follows:

"On and after 10 months after date, if the purchaser desires, he has the option of returning the within named stock at the price paid, together with 10 per cent interest.

"AVERY INVESTMENT COMPANY.

"By FRANK AVERY, Gen. Mangr."

The "within named stock" referred to the stock so purchased by the defendant. Leaving out the question as to Avery's authority to make such an agreement on behalf of the owner of the stock, as to which the record is silent, it does not appear that defendant ever exercised the option to return or offered to return the stock, or ever demanded a return of the money paid therefor, together with interest thereon. For aught that appears to the contrary, he retained, and still retains, the stock, the value of which may have greatly exceeded the amount of the note given in exchange therefor. We find nothing in the record tending to prove that the note was executed without consideration. Nor was there anything in the transaction which, upon the record presented, justifies the claim that the note was procured by fraud. This being true, it was not error for the court to refuse to instruct the jury that the burden of proof rested upon plaintiff to show that he purchased the note without knowledge that it was obtained by fraud or without consideration. The record is entirely silent as to any evidence upon which to predicate such an instruction. It clearly appears that not only plaintiff, but Cross, from whom he obtained the note, were both innocent purchasers, having acquired the

same in the ordinary course of business, each paying therefor substantially its face value, prior to the maturity thereof, and without any notice of the alleged infirmity in the execution thereof.

The appeal is without merit, and the judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1683. First Appellate District.—February 19, 1916.]

LOUIS K. HAGENKAMP, Appellant, v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant; CATHERINE WEGMAN, Intervener and Respondent.

TRIAL — PARTIAL HEARING — TRANSFER TO ANOTHER DEPARTMENT — RESETTING OF CAUSE — LACK OF NOTICE — JUDGMENT PROPERLY VACATED.—A judgment is properly vacated upon the ground that no valid notice of the setting of the cause for trial was given to the intervener or her counsel, where it is shown that after a partial trial had in one department of the superior court in the presence of and with the consent of counsel, the cause was transferred to another department of the same court "for a continuation of the trial" before the same judge, and there placed on the calendar in the absence of counsel for the intervener, and without his knowledge or consent.

ID. — EXCUSABLE NEGLIGENCE OF COUNSEL — ENTRY OF WRONG DATE IN DIARY.—An entry by an attorney in his diary of a wrong date of the trial of an action is such an inadvertence and excusable neglect as will justify the vacating of a judgment in the absence of any suggestion that it was deliberately done as the foundation for a dilatory move in the case.

APPEAL from an order vacating a judgment of the Superior Court of the City and County of San Francisco. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

Howard Harron, for Appellant.

Willard P. Smith, Judson W. Reeves, and Berkeley B. Blake, for Respondents.



LENNON, P. J.—The plaintiff in this action sought to recover from the defendant corporation, Equitable Life Assurance Society, the sum of \$750, alleged to be the proceeds due upon a matured 20-year endowment life insurance policy issued by the corporation defendant to Philip W. Wegman, deceased, and which, during the latter's lifetime, had been assigned by him to the plaintiff. Catherine W. Wegman, the widow of the deceased, by leave of the court first had and obtained, filed in the action her complaint in intervention, wherein she claimed the sum in suit by virtue of an assignment of the policy to her alleged to have been made prior to the claimed assignment thereof to the plaintiff. Issue was joined by the plaintiff upon the allegations of the complaint in intervention; and by stipulation of the parties the corporation defendant deposited with the court the sum in suit upon the condition that it be applied in satisfaction of any judgment which might be rendered in the action for either the plaintiff or the intervener. The record shows the rendition of a judgment on August 7, 1913, in favor of the plaintiff and against the intervener, based upon findings of fact which, among other things, declare that the cause "came on regularly for trial on the sixteenth day of May, 1913, at which time witnesses were sworn and testified, and thereafter the cause was regularly continued" to the seventh day of August, 1913, for "further hearing"; and the cause coming on regularly then to be heard, evidence was introduced and the cause submitted for decision.

The judgment thus rendered was entered of record on August 8, 1913; and the statement upon appeal from the order shows that on that date counsel for the intervener prepared and gave notice to plaintiff and his counsel of a motion to vacate and set aside the judgment upon the ground that no valid notice of the setting of the cause for trial was given to the intervener or her counsel, and upon the further ground that said judgment was rendered and entered through the intervener's inadvertence, mistake, and excusable neglect. The court below ordered the judgment vacated, and it is from that order that the appeal is taken.

The motion to vacate was accompanied and supported by the affidavit of the counsel for the respondent, which, among other things, tended to show that on August 6, 1913, he received a postcard notice from the clerk of the court in which

the action was pending, notifying him that the same had been set for trial, but did not specify the date upon which the trial would be had; and that at about 5:15 P. M. of August 5, 1913, the attorney for the plaintiff served the attorney for the intervener with a notice that the cause had been set for trial on the seventh day of August, 1913, at the hour of 10 o'clock A. M.; that immediately upon receiving said notice the attorney for the intervener proceeded to enter in his office diary a note of the setting of the case for trial, so that his attention in due course would be called thereto, but inadvertently he made such entry in his diary upon the page thereof dated August 8, 1913, instead of August 7, 1913. This affidavit of counsel for the intervener further averred facts which evidently were intended to embody the essentials of an affidavit of merits.

Upon the hearing of the motion to vacate counsel for the plaintiff presented in evidence, in reply to the showing made upon behalf of the intervener, an affidavit which, in its recital of the history of the case, tended to show that the trial thereof was partially had in one department of the superior court upon two different days, in the presence of, and with the consent of, counsel for the intervener, and that upon the conclusion of the second day's trial the case was transferred to another department of the court for "a continuation of the trial" before the same judge who had partially heard the case, and that there it was subsequently ordered to be placed upon the calendar for August 7, 1913, for trial. It was not shown, however, nor is it contended upon behalf of the plaintiff, that counsel for the intervener was present in court when the case was so placed upon the calendar. In reply to the foregoing affidavit counsel for the intervener filed an affidavit alleging facts which tended to show that the cause was never set for trial prior to August 7th, and was not tried wholly or in part prior to that date, and that the prior taking of the testimony of certain witnesses—claimed by the plaintiff to have constituted a trial—was merely had in lieu of the taking of their depositions, and was done by virtue of a stipulation between the respective parties.

In support of the appeal it is one of the contentions of counsel for plaintiff that if it be true that the case was partially heard in the presence of, and with the consent of, counsel for the intervener in one department of the superior court,

then, notwithstanding the transfer of the case from one department to another, he must be deemed to have had actual knowledge of what was done in the case after as well as before the transfer, and consequently the notice served upon him was wholly unnecessary, and cannot be made the basis for the claim of inadvertence and excusable neglect. It is also insisted that the findings and judgment originally made and entered were, in the absence of proceedings to correct the record, conclusive upon the parties to the action, and that therefore the finding of the lower court necessarily implied from the order vacating the judgment, contradicting the recitals in the findings and judgment originally made and entered, cannot be rightfully resorted to in aid of the order vacating the judgment; and that the only remedy available to the intervener in the circumstances was a motion for a new trial grounded upon the provisions of subdivision 3, section 657, of the Code of Civil Procedure.

Conceding without deciding that the proceedings had in the case prior to August 7, 1913, constituted a partial trial of the case, at which counsel for the intervener was present, nevertheless no showing was made that he was present in the department to which the case was subsequently transferred at the time it was ordered on the calendar of that department, or that he had actual knowledge of such order and consented thereto. The order thus made was in effect a resetting of the cause for trial, and it not having been shown that it was made with the knowledge and consent of the counsel for the intervener, a further trial of the case could not be had in his absence without giving him the five days' notice required by section 594 of the Code of Civil Procedure. (*Estate of Dean*, 149 Cal. 487, [87 Pac. 13].) There is much force in the contention that, in the absence of proceedings to make the record conform to the fact, the recitals of the findings and judgment to the effect that a trial of the case was actually had should, in the absence of a motion for a new trial, prevail over the finding to the contrary. We do not deem it necessary, however, to decide the question of practice involved therein in the presence of a record which shows that the motion to vacate was grounded and granted upon the failure to give the statutory notice required for the setting of the cause for trial, and also upon the alleged mistake, inadvertence, and excusable neglect of counsel for the intervener in making a wrong

entry in his office diary of the date set for the trial of the cause. The order granting the motion to vacate being general in its terms covered both grounds; and if the evidence adduced in support of either be sufficient, the order vacating the judgment must be affirmed.

The evidence is undisputed that the statutory notice of the setting of the cause for trial was not given to the counsel for the intervener, and therefore the order appealed from is fully supported upon that ground alone; but even if it be assumed that the statutory notice was waived by accepting and acknowledging without protest service of a shorter notice, still we think the finding of inadvertence and excusable neglect implied from the making of the order appealed from is also sufficiently supported by the evidence.

There is no merit in the contention that the evidence is insufficient in the particular that it does not show that counsel for the intervener was accustomed to rely upon the entries made in his office diary for information concerning the *status* of causes in which he was interested. If this contention be worthy of an answer, the answer is to be found in the averment of the affidavit of counsel for the intervener that he made the entry in question "upon his office diary in order that the same might be drawn to his attention in due course."

The error of counsel for the intervener in entering in his diary the date of the trial was not an unlikely inadvertence, and was entirely free from any suggestion that it was deliberately done as the foundation for a dilatory move in the case. Moreover, the complaint in intervention not only discloses a substantial cause of action—which the record shows had been previously prosecuted with vigor and in good faith—but further, that on the day following the rendition of the judgment proceedings were immediately instituted by counsel for the intervener to have it vacated. As was said in the very recent case of *Berri v. Rogero*, 168 Cal. 736, [145 Pac. 95]: "Where a party in default makes seasonable application to be relieved therefrom . . . very slight evidence will be required to justify the court in setting aside the default."

We are of the opinion that the affidavit of merits filed in support of the motion was sufficient, notwithstanding that it was not couched in the phraseology generally employed in such an affidavit; but even if the affidavit be conceded to be deficient in the particulars pointed out by counsel for the

plaintiff, the allegations of the verified complaint in intervention were sufficient to constitute an affidavit of merits.

The one remaining point made in support of the appeal relative to the insufficiency of the verification to the complaint in intervention is trivial, and not deserving of serious consideration.

The order appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 14, 1916.

[Civ. No. 1719. Second Appellate District.—February 19, 1916.]

JULIA R. DOX et al., Respondents, v. R. E. LOMAX COMPANY (a Corporation), Appellant.

CONTRACT — SALE OF CORPORATION STOCK — FRAUD — AUTHORITY OF AGENT.—Where one securing a purchaser for stock of a corporation represents the corporation in so doing, it must be assumed that he possesses all the usual and ordinary authority of such a sales agent, and actionable misrepresentations made by such agent in the sale are chargeable to the corporation, and a recovery against the corporation therefor may be had.

ID.—RIGHT TO RECOVER PURCHASE PRICE OF STOCK.—Where the agent of a corporation in the sale of its stock falsely represented that the corporation was doing a profitable business and earning a profit of not less than ten per cent on invested capital, and that during the whole period of its existence a dividend of ten per cent had been paid, which representations were relied upon by the purchaser, whereas, in truth the corporation at that time was not earning profits, but was insolvent, the purchaser may maintain an action for the recovery of the purchase money.

ID.—RIGHTS OF CREDITORS.—Creditors of the corporation whom the records do not show became creditors subsequent to the sale are not injured by a judgment in favor of the purchaser for the recovery of the purchase money, and cannot complain.

APPEAL from a judgment of the Superior Court of Los Angeles County. William D. Dehy, Judge presiding.

The facts are stated in the opinion of the court.

Norman A. Bailie, for Appellant.

A. W. Sorenson, for Respondents.

JAMES, J.—The plaintiff sued to recover the sum of one thousand dollars, with interest, alleged to have been paid in December, 1912, as the purchase price for two hundred shares of the capital stock of defendant corporation. She alleges that coincident with the making of that purchase, and as a part of the contract, the corporation defendant executed in her favor the following writing:

“R. E. Lomax Co.

“Los Angeles, Cal., Dec. 6, 1912.

“This is to guarantee that in event of Mrs. Julia R. Dox wishing to sell her stock at any time—on six months’ notice the above Co.—(R. E. Lomax Co.—) will purchase it at its face value— This also guarantees a profit of not less than 10% per annum.

“R. E. LOMAX Co.,

“J. P. T.”

In a separate cause of action she alleged that she was induced to purchase the stock by reason of certain false representations made by defendant, to the effect that the corporation was doing a profitable business and earning a profit of not less than ten per cent on the invested capital, and that during the whole period of the existence of the corporation a dividend of ten per cent had been paid. There was added by amendment a cause of action for money had and received. A stipulation of facts was filed in the case, and judgment followed in favor of plaintiff for the recovery of one thousand dollars, with interest at seven per cent from the date of the purchase of the stock. The appeal is from that judgment.

In the stipulation of facts it is admitted that plaintiff purchased the shares of stock described in her complaint for the consideration therein stated on or about the sixth day of December, 1912, and “that the negotiations for the sale and purchase of said stock were on the part of said R. E. Lomax Company conducted by one J. P. Tait, who was then and there a director and officer, to wit: Vice President of said R. E. Lomax Company, . . . ” It was further admitted that Tait

had signed and issued the guaranty contract set out in plaintiff's complaint, and that R. E. Lomax, president and general manager of the corporation, had knowledge of the guaranty and consented thereto; that on the ninth day of June, 1913, the plaintiff notified the company that she elected to sell and dispose of her stock in accordance with the terms of the writing, and that upon the expiration of the six months' period prescribed in said contract she tendered to the company the certificate of stock, with an assignment thereon properly executed, and demanded the sum of one thousand dollars and that she had tendered into court the certificate for the two hundred shares. It was further stipulated that the corporation had received the one thousand dollars and had used it in its corporate business. Further facts were stipulated as follows:

"That on or about the 6th day of December, 1912, said J. P. Tait and said R. E. Lomax, in order to induce said plaintiff to purchase said stock, and to pay therefor the sum of One Thousand Dollars (\$1,000), represented to said plaintiff that said corporation was then and there doing a profitable and lucrative business and earning a large profit on its invested capital; that in truth and in fact said corporation was at said time not doing a profitable and lucrative business and was not earning a profit on its invested capital, and was at said time insolvent; that plaintiff relied wholly on said representations and she would not have entered into said contract, or paid the said sum of One Thousand Dollars (\$1,000), or any part thereof for said certificate of stock had it not been for said representations; that the said plaintiff did not discover the falsity of said representations so made to her by said defendants until on or about the 1st day of June, 1913, and that on the 16th day of December, 1913, she offered to return to said defendants said certificate of stock with a properly executed assignment thereof, and notified defendants, and each of them, of her election to rescind said contract and to return everything of value to defendants, which she had received under and by virtue of said contract, and demanded that defendants pay to her the sum of One Thousand Dollars (\$1,000); that said stock was at all times worthless. That at the time the aforesaid representations were made by way of inducement, the individuals making them believed them to be true."

Other facts were stipulated showing that in May, 1913, a resolution of the board of directors of defendant corporation was adopted authorizing the president to file a voluntary petition in bankruptcy, or to execute a general assignment for the benefit of creditors; that 9,850 shares of the total 11,600 shares were transferred to two persons as trustees for the benefit of the creditors, who, subsequent to that time, had managed the corporation and had, up to the time of the filing of the stipulation of facts, realized but fifteen per cent of the amounts due to the general creditors of the corporation, and that the corporation had not assets enough to pay all of the creditors in full. The tender of the stock and the demand upon the acting officers of the corporation were admitted.

It is insisted on the part of appellant that the guaranty contract, so called, was never properly executed so as to bind the corporation. It seems that this was so. The contract was not regularly executed by the president and secretary with the seal of the corporation attached, nor was it shown that the directors had knowledge of its existence, other than that the president and vice-president had knowledge thereof. Without giving any effect to the alleged contract, we find, however, in the stipulation of facts, as we have quoted above, that Tait, who secured the plaintiff as a purchaser of its stock, represented the corporation in so doing; hence it follows that he was an agent for that purpose and, we must assume, possessed all the usual and ordinary authority of such a sales agent. Actionable misrepresentations made by such an agent, as they were shown to have been made to this plaintiff, in our opinion, may unquestionably be chargeable to the corporation and a recovery be sustained by reason of such fraud. It will be noted that in the stipulation of facts it was agreed that, instead of a profit being derived from the business of the corporation at the time of this stock transaction, the corporation was in fact insolvent. There is but little serious disagreement in the authorities that, under such facts as are here stipulated, a stock purchaser may successfully maintain an action for the recovery of his money. (*Curtin v. Salmon River etc. Co.*, 141 Cal. 308, [99 Am. St. Rep. 75, 74 Pac. 851].) It is claimed, further, on the part of appellant that rights of creditors have intervened since the purchase of this stock which will be improperly affected if the judgment as entered is allowed to stand. In refutation of this contention the stipulation of

facts may again be referred to: In that stipulation it is shown that at the time of the sale of the stock the corporation was insolvent; it is shown that at a later date the creditors took over the management of the corporation and that they have since conducted its affairs. There is nothing at all shown among the stipulated facts to indicate that any of these creditors became creditors of the corporation subsequent to the time that the sale of stock to plaintiff was made. If they were creditors at the time of the sale, as we must assume in support of the judgment they were, then they parted with nothing upon the assumption that the one thousand dollars paid into the corporate treasury by the plaintiff was a part of the assets thereof. Otherwise stated, it appears that the creditors have had the benefit of the money of the plaintiff, which was obtained from her through the fraud of the authorized selling agents; that they have suffered no detriment in reliance upon the illegal contract obtained through the fraud of such agents. The corporation is still in existence, and is not in the hands of the court or conditioned in any way which may relieve it from the effect of this action.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 14, 1916.

[Civ. No. 1689. Second Appellate District.—February 19, 1916.]

PACIFIC RAILWAYS ADVERTISING COMPANY (a Corporation), Appellant, v. JESSIE WILLIAMSON CARR, Respondent.

PROMISSORY NOTE—WANT OF CONSIDERATION—INVALID DEMANDS—DEFENSE.—A promissory note, given in assumption of an alleged indebtedness which in fact did not exist, has no consideration to support it, and a new promissory note executed in lieu of the first at the date of its maturity also lacks consideration, and this fact may be pleaded in defense to an action thereon.



ID.—CONTRACT—CONSIDERATION.—A promise to perform a legal obligation is not a sufficient consideration for a contract based thereon; neither is the release of a purported claim against one upon whom there rests no legal or moral obligation to pay the same a sufficient consideration for a third party's promise to pay such non-enforceable claim, unless it be upon the compromise of a doubtful or disputed claim.

ID.—RENEWAL OF NOTE—WANT OF CONSIDERATION.—A note given in renewal for one void for want of consideration is, like the first, invalid and unenforceable.

ID.—VOID NOTE—EXTENSION OF TIME OF PAYMENT—LACK OF CONSIDERATION.—Giving an extension of time within which to pay a void note constitutes no consideration for a renewed promise to pay same.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

Slosson & Mitchell, for Appellant.

W. E. SoRelle, for Respondent.

SHAW, J.—Action to recover upon a promissory note made by defendant to plaintiff. The case was tried before a jury, which brought in a verdict for defendant. Judgment followed in accordance therewith.

Plaintiff appeals from an order of court denying its motion for a new trial. While admitting the making of the note and nonpayment thereof, defendant insists there was no consideration for its execution. The note was given in renewal of one theretofore executed by defendant to plaintiff under the following circumstances: Under a purported contract made by plaintiff with a corporation known as the Amritam Company there was, on August 21, 1912, claimed to be due to plaintiff from the latter company the sum of \$442. This contract was executed on behalf of the Amritam Company, without the corporate seal affixed thereto, by J. S. Benner, secretary and treasurer thereof. No authority was ever conferred upon him to execute such contract; nor was there any ratification thereof. After the alleged liability had been so incurred, defendant acquired an interest in the Amritam Company, and

upon being informed by said Benner, secretary of the company, that the contract constituted a binding obligation of the company, she accompanied him to the office of plaintiff and agreed to assume the alleged indebtedness based upon said proposed contract, then past due, and as evidencing such agreement she executed her note upon the maturity of which she, in renewal thereof, executed the note here involved. Whereupon, plaintiff released said Amritam Company from liability upon the contract.

Conceding the contract was not an obligation of the Amritam Company, as to which there seems to be no doubt (*Black v. Harrison Home Co.*, 155 Cal. 121, [99 Pac. 494]; *Oscar Bonner Oil Co. v. Pennsylvania Oil Co.*, 150 Cal. 658, [89 Pac. 613]; *Fontana v. Pacific Can Co.*, 129 Cal. 51, [61 Pac. 580]), appellant nevertheless insists that defendant could not avail herself of such fact as a defense to the action based upon the note, and therefore the court erred in permitting defendant to show that the pretended obligation of the Amritam Company to plaintiff which constituted the consideration for executing the note had, in fact, no existence. The consideration for her note was the purported obligation of the company upon this contract; but there was no obligation, either express or implied. This being true, it cannot be said there was any consideration for the execution of the note sued upon. Clearly, if suit had been brought upon the contract against the Amritam Company, no recovery could have been had thereon upon a showing of the facts here presented. And if there was nothing upon which to base an action against the Amritam Company, it must follow that plaintiff, in releasing the company from liability which did not exist, suffered no prejudice by reason thereof. A promise to perform a legal obligation is not a sufficient consideration for a contract based thereon. (*Sullivan v. Sullivan*, 99 Cal. 187, [33 Pac. 862].) Neither is the release of a purported claim against one upon whom there rests no legal or moral obligation to pay the same a sufficient consideration for a third party's promise to pay such nonenforceable claim, unless it be upon the compromise of a doubtful or disputed claim. At the time of executing the note there existed no dispute between plaintiff and the Amritam Company; indeed, for aught that appears in the record to the contrary, the company had no knowledge of the existence of the purported contract, or alleged services per-

formed by plaintiff thereunder. In 9 Cyc., page 357, it is said: "So by the weight of authority, where services are rendered to another without any request and under circumstances which do not raise an implied contract on his part to pay for them, a promise founded on motives of honor or gratitude is not on a sufficient consideration." Since the note was executed upon representations to defendant that a binding contract existed between plaintiff and the Amritam Company which obligated the latter to pay to plaintiff a sum of money, she was entitled, in defense of the action, to show there was no such obligation.

A note given in renewal for one void for want of consideration is, like the first, invalid and unenforceable. (*Alabama Nat. Bank v. Halsey*, 109 Ala. 196, [19 South. 522]; *Comings v. Leedy*, 114 Mo. 454, [21 S. W. 804]; *Cochran v. Perkins*, 146 Ala. 689, [40 South. 351].) This being true, it was therefore not error, as claimed by appellant, for the court to instruct the jury that where a note is executed by a payee in renewal of a former note given by him for which there was no consideration, such renewal note is likewise affected with the infirmity in the giving of the first. Giving defendant an extension of ninety days within which to pay a void note constituted no consideration for her renewed promise to pay the same.

There are no other errors presented which merit discussion. The order from which the appeal is prosecuted is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1766. First Appellate District.—February 21, 1916.]

ANNIE CAIN, Respondent, v. HENRY FRENCH,
Appellant.

COSTS—BRIEFS ON APPEAL—CONSTRUCTION OF SECTION 1027, CODE OF CIVIL PROCEDURE.—Under the amendment of 1913 to section 1027 of the Code of Civil Procedure, a party is entitled to recover his costs in printing a reply brief on appeal, not exceeding \$50, although the brief was filed before the amendment to that section, which then did not provide for such costs, where the judgment did not become final upon appeal until after the passage of the amendment.

1D.—MODIFICATION OF STATUTE.—Costs are but an incident of a judgment, and the rule pertaining to the allowance of costs in an action may be changed or modified by statute during its pendency.

APPEAL from an order of the Superior Court of Santa Clara County denying a motion to retax costs. P. F. Gosbey, Judge.

The facts are stated in the opinion of the court.

Henry French, *in pro. per.*, for Appellant.

E. A. Wilcox, C. F. Crothers, and Fry & Jenkins, for Respondent.

LENNON, P. J.—This is an appeal from an order denying the defendant's motion to retax the plaintiff's costs in the above-entitled action.

Upon the hearing of the motion the only objection urged to the cost bill related to the charge of \$30.65 for the printing of the plaintiff's brief in reply to the brief of the defendant upon the latter's appeal from the judgment originally entered in the action in favor of the plaintiff. The sole point made in this court in support of the appeal is that when the plaintiff's reply brief was filed upon the original appeal the expense incurred for the printing of such brief was not allowable as an item of costs, and that therefore such item could not be properly taxed against the defendant by the lower court upon the going down of the *remittitur*.

The plaintiff's reply brief upon the original appeal was filed in this court on May 27, 1913, and at that time "there was no provision by rule or statute authorizing the taxing as costs of the expense of printing briefs . . ." (*Estate of Prager*, 167 Cal. 737, [141 Pac. 369]); but upon August 10, 1913, an amendment to section 1027 of the Code of Civil Procedure went into effect, whereby the prevailing party upon an appeal was given the right to charge as an item of the costs in the action the expense of printing briefs when the same did not exceed the sum of \$50. The plaintiff's memorandum of costs and disbursements in the present case was filed in the lower court after the going down of the *remittitur* from this court on December 14, 1914, and the

defendant's motion to retax was heard and denied on December 21, 1914. It will thus be seen that the amendment to the statute permitting the expense of printing briefs upon appeal to be charged as a part of the costs of the prevailing party was in force and effect prior to and at the time when, by the affirmance of this court, the judgment in favor of the plaintiff became final.

Costs are but an incident of a judgment, and the rule pertaining to the allowance of costs in an action may be changed or modified by statute during its pendency. (*Ellis v. Whittier*, 37 Me. 548; *Billings v. Segar*, 11 Mass. 340.) Admittedly, an action once instituted is thenceforth pending at every instant of time until final judgment has been pronounced and entered up. The plaintiff in the present case was not entitled to the fruits of her judgment until it was finally determined in her favor by the affirmance of it by this court; and therefore the statute in force at the time when the judgment was thus made final covers and controls the allowance of costs to her. (*Hepworth v. Gardner*, 4 Utah, 439, [11 Pac. 566].)

The order appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 14, 1916.

[Crim. No. 570. First Appellate District.—February 23, 1916.]

THE PEOPLE, Respondent, v. TENUNZIO PITISCI,
Appellant.

CRIMINAL LAW—MURDER—PREJUDICIAL REMARKS OF COURT—INTIMATION OF FALSITY OF DEFENSE.—In a prosecution for murder it is prejudicial error for the court, in the presence and hearing of the jury, when ruling upon an objection to evidence offered in support of the defendant's plea of self-defense, to remark that the claim that the deceased took the dagger, by means of which the killing was accomplished, from the person of the defendant was "an absurdity," and that the alleged threat of the deceased to kill the defendant was "a mere idle statement made by the deceased."

- ID.—INSTRUCTION—DISCLAIMER OF OPINION—ERROR NOT CURED.**—Such error is not cured by an instruction given to the jury upon the conclusion of the argument upon the admissibility of such evidence that there was no intent upon the part of the court to show its belief in either the truth or falsity of the testimony, nor to intimate any personal view as to its value.
- ID.—INSTRUCTION TO DISREGARD MISCONDUCT—REMOVAL OF PREJUDICE—GENERAL RULE INAPPLICABLE.**—While, ordinarily, an admonition of the trial court to the jury to disregard misconduct of either the judge or district attorney will, in the absence of an affirmative showing of injury, suffice to remove any prejudice resulting therefrom in the minds of the jury, which rule is founded upon the presumption that the jury will heed the admonition of the trial judge, such presumption does not prevail in the presence of an impropriety upon the part of the trial judge, which in its very nature was calculated to weaken, if not utterly destroy, a legitimate and substantial defense apparently interposed in good faith.
- ID.—ALLEGED THREAT OF DECEASED — PROOF BEYOND REASONABLE DOUBT—ERRONEOUS INSTRUCTION.**—An instruction given at the request of the prosecution which in effect charged the jury not to consider the alleged threat of the deceased to kill the defendant, unless that fact had been clearly established in evidence beyond all reasonable doubt, is clearly erroneous, as such fact need be proved only by a preponderance of the evidence.
- ID.—MISCONDUCT OF DISTRICT ATTORNEY—STATEMENT OF CONTENTS OF EXCLUDED LETTER.**—It is misconduct for the district attorney to state to the court, in the presence and hearing of the jury, the contents of a letter addressed to the deceased and purporting to have been written by her husband, upon a second attempt to get the letter in evidence, where the letter had been read by the court upon its first offer.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

O’Gara & De Martini, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

LENNON, P. J.—The defendant was convicted of murder in the second degree. His defense was self-defense. He appeals from the judgment and order denying him a new trial

The facts of the case upon which the conviction was sought and secured are substantially these: The defendant at the time of the homicide was an unmarried man of about 25 years of age. He was a Sicilian by birth. The deceased was an Andalusian. They became acquainted some time in the latter part of the year 1912. The deceased was a married woman, and at the time of the homicide was about 22 years of age, and was living apart from her husband because of marital difficulties. The acquaintance between the defendant and deceased developed into a *liaison*, which continued till within two weeks of her death. At about 8 o'clock on the evening of May, 8, 1914, the defendant called upon the deceased at her home, where she resided with her father and two brothers, and, save for the presence of her two babies, found her alone. Shortly thereafter Joseph A. Solemi, who resided with his mother in apartments immediately above those occupied by the deceased, heard a woman screaming. He ran down the stairs into the kitchen of the apartment of the deceased, and called out, "What's the matter, Mary!" The deceased cried out, "I am being murdered; I am being killed." Save for a light in the kitchen the premises of the deceased were in darkness when Solemi entered, but he proceeded to the room from whence the voice came, and there by the light of a cigarette-lighter he discovered the deceased and the defendant lying upon the floor. The deceased was face downward, and the defendant, with his hand closed over a dagger, was lying upon his back alongside of her with his head resting upon her hips. The police were then called, and an examination showed that both the deceased and the defendant were suffering from several severe knife wounds. One of the policemen attempted to question the defendant as to the cause of the affray, but the defendant made no reply save to say, "I wish I was dead." The record shows, however, that whatever was said by the defendant at that time to the policeman was said in Italian, and the witness who acted as interpreter and translated what the defendant had said was not certain whether the words were "I wish I was dead" or "I am dying." The deceased succumbed to her wounds on the way to the receiving hospital, and the defendant for several hours was in a semi-conscious condition as the result of his injuries.

As a witness in his own behalf the defendant testified upon the trial, in substance, that in the latter part of the year 1913, and during the time he was living in illicit relations with the deceased, he became acquainted with and began to pay court to a young woman of his own nationality, and in January, 1914, became engaged to marry her. The wedding was to take place in the month of July following; and in the meantime the defendant endeavored to sever his relations with the deceased, and to that end removed his residence from San Francisco to San Jose, where on March 21, 1914, he wrote and mailed to her a letter, in which he informed her that he intended to marry a girl of his own nationality. The deceased in her answer and in several other letters which she wrote to the defendant at various times showed that she was deeply infatuated with him, and indicated that she would not be content to give him up. Upon one occasion the defendant visited San Francisco at the request of the deceased, and attempted, though unsuccessfully, to arrange an amicable severance of their relations. In April, 1914, the defendant returned to San Francisco to reside. After he had been in San Francisco for about a week, during which time he had not called upon the deceased, she, uninvited, called upon him several times at his apartments. Two weeks before the homicide he met her at her request on Powell Street near Broadway, and she then asked him to leave San Francisco and go to Los Angeles with her. Upon the defendant declining to do so she said, "Everybody says you are going to marry the Italian girl, but before you do so I will kill you." A few days before the homicide the deceased approached defendant in the street and said to him, "I want you to come to my house. Will you come?" The defendant promised that he would call, and went there accordingly on the evening of the homicide, at about 8 o'clock, as previously narrated. She received him affectionately; she "kissed him and caressed him," and while they were sitting upon her bed without a light in the room she said to him, "I want you to go to Los Angeles with me because my husband will be here. . . . to-morrow." The defendant replied that he did not want to go to Los Angeles, for the reason that he had no money and could not get employment there; whereupon the deceased said, "You want to marry the Italian girl," to which the defendant answered,

"Yes." Thereupon the deceased suddenly pushed the appellant back upon her bed and placed one of her hands against either his chest or throat. The defendant always carried a dagger, of which fact the deceased was aware. While he was in that position on the bed and in the dark he felt a stinging sensation in his breast; he felt blood trickling down his body, and then realized that he had been stabbed by the deceased, evidently with his own dagger, which had been extracted by her from the place where he had been in the habit of carrying it on his person. Thereupon the defendant grappled with the deceased. She still fought with him and stabbed him, but finally he secured possession of the dagger, and in the frenzy of the fight stabbed her with it until she fell at his feet, and he, exhausted, sank alongside of her.

The foregoing statement of the facts of the killing and the circumstances immediately preceding and attending it, as narrated by the defendant, constituted the foundation of his plea of self-defense; and although that statement is incomplete in many matters of minor detail, nevertheless it will suffice for the consideration of the points presented in support of the appeal, viz.: (1) misconduct on the part of the trial judge, in the presence of the jury, resulting in substantial injury to the defense upon which the defendant relied; (2) alleged prejudicial misconduct of the district attorney; and (3) the giving of an instruction which erroneously charged the jury that the burden was upon the defendant to establish the existence of a fact upon which he relied in support of his plea of self-defense to a moral certainty and beyond a reasonable doubt.

The assignment of misconduct on the part of the trial judge deals primarily with certain comments of the trial judge made during the endeavor of counsel for the defendant to show in evidence, in support of his plea of self-defense, by the testimony of a witness upon the stand that the deceased had made a threat that she would kill the defendant "if he married the Italian girl." The proffered proof was objected to by the district attorney upon the ground that it was irrelevant, incompetent, and immaterial, and the trial judge apparently was of the opinion that it was not admissible in the absence of a showing that the threat of the deceased had been communicated to the defendant. The dis-

cussion of this question was had in the presence of the jury, and occupied a large part of two trial days. Upon this phase of the case the record speaks best, and is as follows:

"Q. You were on intimate relations with the deceased?
A. Yes, sir.

"Q. She had visited at your house? A. Yes, sir.

"Q. During the early part of last winter or the latter part of the fall of last year did you ever have any conversation with the deceased regarding a divorce between herself and her husband? A. Yes, sir.

"Q. Also a conversation regarding trouble between herself and her husband? A. Yes, sir.

"Q. Now, what was that conversation?

"Mr. Berry (Deputy District Attorney): Just one moment. We object to that question on the ground that it is incompetent, irrelevant, and immaterial.

"The Court: Sustained.

"Mr. De Martini (Counsel for Defendant): Q. During the months of February and March did you have any conversation with the deceased relative to—

"The Court (Interrupting): Well, now, Mr. De Martini, I don't see how you can expect to prove a conversation with the dead woman by this woman.

"Mr. De Martini: Well, if your Honor please, we want to show—

"The Court (Interrupting): Well, you can't show it that way.

"Mr. O'Gara (Associate Counsel for the Defendant): If your Honor please, the point is this: we expect to show—whether by this question or another I am not able to say . . . to show threats made by the deceased against the life of the defendant in regard to taking the life of the defendant.

"The Court: Threats?

"Mr. O'Gara: —in the course of conversations threats made by the deceased against the life of the defendant.

"The Court: —and communicated to this defendant? (Argument between court and counsel and reading of authorities.) That would not assist you, Mr. O'Gara.

"Mr. O'Gara: I am afraid your Honor has not read the part I wish to call to your Honor's attention as to threats made showing motive.

"The Court: Just a mere idle statement made by this deceased and not communicated to the defendant, in the absence of anything else, is not proper.

"Mr. O'Gara: I wish to point out to your Honor that this certain question was discussed by the decision in this case, and threats were made against the life of this defendant, and whether it was communicated or not would not make any difference. In other words, this is the point, your Honor: Where it is the claim of the defendant that the other party was the aggressor, and the prosecution claims that it was the defendant who was the aggressor—

"The Court: Well, I have read the decision. I understand it and your point here—

"Mr. O'Gara: Well, I wanted to make a statement to your Honor of my point of view.

"The Court: I don't care about any argument. . . .

"Mr. O'Gara: I will offer at this time to prove by this witness that in the conversation referred to the deceased said to her that the defendant was going with an Italian girl and expected to marry her, but that before the defendant married that Italian girl she, the deceased, would kill him. I offer to show that was precisely stated by the deceased at that time and place by this witness.

"The Court: You don't propose to show that this statement was communicated to the defendant?

"Mr. O'Gara: No, your Honor, I do not.

"The Court (After Argument): I will not hear any more argument. As I say, in the decisions which you have suggested the facts are quite different than are the facts that appear here. In other words, I am satisfied that those facts do not appear here in this case. I don't want the jury to hear any more argument. I will continue the rest of the hearing until to-morrow morning and give you an opportunity to be heard then. Do I make myself plain now?

"Mr. O'Gara: Yes, I understand your Honor exactly."

At the resumption of the trial on the following morning the record shows the following:

"The Clerk: The jurors are present, your Honor.

"Mr. O'Gara: If your Honor please—in relation to the question which was under discussion when the court took an adjournment last evening, I have brought to the court

this morning some cases on which I rely, and am prepared to submit them to your Honor.

"The Court (Addressing Mr. Berry): What is the proposition?

"Mr. Berry: If counsel will permit, it will not be necessary to have him continue further on this subject, for I have examined authorities submitted by counsel, and also have delved into other authorities, and I find that under such circumstances as these evidence in this action is admissible though not being shown to have been communicated. There is one case, and that is where there is some doubt as to who started the affray resulting in the death of the deceased.

"The Court: Yes, but I doubt if you will find any declaration of any court on any facts analogous to those I assume would be developed here. In all those cases I am familiar with there was some evidence of a quarrel, or where both parties were in an excited state of mind; but here the defendant himself is the only person who had a weapon; it is not claimed that this woman had a weapon, but he went to this place, the place of the killing or the alleged killing, with this weapon. It is claimed she took it from him—an absurdity. Now, you keep in mind that the defendant himself goes to this place and he goes armed, and he is the only person who is armed. It is not claimed that the deceased was armed.

"Mr. O'Gara: Yes, but there may be half a dozen people in this room who have got pistols in their pockets—

"The Court (Interrupting): Confine your argument to the facts. I have stated all the facts, have I not?

"Mr. O'Gara: No, your Honor, I don't think you have stated all the facts.

"The Court: I have stated the essential parts as we could gather them.

"Mr. O'Gara: The defendant went there without any thought or intention that there was to be trouble.

"The Court: But he did go there with a weapon and with the weapon that it is alleged caused the death of the deceased. Your statement as to whatever quarrel developed or whatever happened there which led to the death of the decedent, was simply an act on her part of taking the weapon from his inside pocket."

Subsequently the proffered proof of the threat made by the deceased was admitted in evidence, and the witness upon the stand, in answer to proper questions, testified in effect that the deceased had said to her that if the defendant married the Italian girl she would kill him.

The comments of the trial judge made in the foregoing excerpt from the record, wherein he belittled the effect of the proffered testimony, and discredited the defendant's plea of self-defense, were so obviously improper that nothing can be said in justification of them. The attorney-general on behalf of the people does not attempt a justification of the objectionable comments, nor is it contended that they did not seriously prejudice the defendant and damage his defense in the eyes of the jury; but it is contended that such injury and damage were cured and corrected by the special charge of the trial court given to the jury upon the conclusion of the argument upon the admissibility of the evidence in question, and that therefore the defendant now has no cause for complaint.

We cannot agree with this contention; and in failing to do so we have in mind the rule that ordinarily an admonition of the trial judge to the jury to disregard misconduct of either the judge or district attorney will, in the absence of an affirmative showing of injury, suffice to remove any prejudice resulting therefrom in the minds of the jury. The rule in this behalf is founded upon the presumption that the jury will heed the admonition of the trial judge; but we do not understand that that presumption prevails in the presence of an impropriety upon the part of the trial judge such as is presented for review in the present case; which in its very nature was calculated to weaken, if not utterly destroy, a legitimate and substantial defense apparently interposed in good faith. That such was the tendency of the comments complained of there can be no doubt. The declaration of the trial judge that the claim that the deceased took the dagger from the defendant's person was "an absurdity" expressed the opinion of the trial judge, as clearly and as convincingly as the English language could express it, that the defendant's plea of self-defense was founded in falsehood; and the trial judge's characterization of the threat relied upon to support that defense as "a mere idle statement made by the deceased" could have had no other

effect in the minds of the jury than to seriously impair, if not utterly destroy, the probative value and effect of the evidence subsequently offered and admitted to establish a material fact in the defendant's favor.

In the case of *People v. Conboy*, 15 Cal. App. 97, [113 Pac. 703], this court reiterated and reaffirmed the doctrine enunciated by the supreme court of Alabama (*Hair v. Little*, 28 Ala. 236), that "it is of the highest importance in the administration of justice that the court should never invade the province of the jury; should give them no intimation as to its opinion upon the facts; but should leave them wholly unbiased by any such intimation to ascertain the facts for themselves." When we stop to consider that "from the high and authoritative position of a judge presiding at the trial before a jury his influence over them is of vast moment" (*McMinn v. Whelan*, 27 Cal. 300, 319), and "that juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the court some intimation as to what their findings should be upon the facts" (*Hair v. Little*, 28 Ala. 236), and "the readiness with which a jury frequently catches at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge in closely balanced cases" (*People v. Williams*, 17 Cal. 142, 147), we cannot conceive that the comments complained of in the present case, although addressed to the counsel for the defendant, did not have the effect of irresistibly and indelibly impressing upon the minds of the jury the belief that it was the opinion of the trial court that the defendant was guilty as charged. It is idle to argue, and it would be bordering upon the ridiculous for this or any other court to say that because the objectionable remarks of the trial judge were not addressed directly to the jury, it must be presumed that the jury ignored them. It was but natural for the jury to listen to and become interested in the discussion between court and counsel, and any presumption to the contrary would do violence to the every-day experience and observation of lawyer and layman alike.

As was said in the case of *State v. Harkin*, 7 Nev. 377: "It is evident that the opinion of the court can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon an objection to the evidence, as by embodying

it in what purports to be a declaration of law for their guidance. . . . The right to a decision on the facts uninfluenced and unbiased by the opinions of the judge has been deemed worthy of a constitutional guaranty. It cannot be lawfully denied by the simple evasion of looking at counsel instead of the jury, or of foisting the opinion into a ruling upon the testimony."

To permit the trial judge to say in the presence of the jury, under the guise of a ruling upon the admissibility of evidence, that which the constitution prohibits him from saying directly to the jury, would be to put the seal of approval upon a mere subterfuge of which it has been said that "the wit of man could scarcely devise a more palpable violation of that provision of our organic and statute law which prohibits judges from charging juries in respect to matters of fact." (*State v. Harkin*, 7 Nev. 377.)

Of what avail, then, was it for the trial judge to say to the jury, "I want you gentlemen to understand that in all this discussion there is no intent upon the part of the court to show his belief in the testimony, either the truth or the falsity of it; nor does the court intimate any personal view as to the value of the testimony, or of the claim made by counsel of the defendant of the state"? Manifestly, this was not a retraction of the previous remarks of the trial judge which indicated that he was strongly of the opinion that the defendant's defense of self-defense was a preposterous fabrication, and that the proof proffered in support thereof was puerile. At best the trial judge did no more than to disclaim that he had expressed or intended to express an opinion upon the merits of the case; but the verity of the disclaimer was impugned by the fact that he had actually and emphatically expressed an opinion upon the most vital facts of the defendant's case. The fact that such opinion may have been unintentionally expressed did not tend to lessen its weight with the jury, and consequently it cannot be said that the charges in question sufficed to efface the prejudicial effect of the opinion. (*People v. Willard*, 92 Cal. 482, 489, [28 Pac. 585]; *People v. Kindleberger*, 100 Cal. 367, [34 Pac. 852]; *People v. Chew Sing Wing*, 88 Cal. 268, 272, [25 Pac. 1099]; *People v. Conboy*, 15 Cal. App. 97, [113 Pac. 703].)

A letter addressed to the deceased, and purporting to have been written by her husband, was offered in evidence by the district attorney. When the letter was first offered in evidence objection was made upon behalf of the defendant that it was hearsay, etc., whereupon the trial court, upon its own motion, read the letter, and then expressed doubt as to its admissibility. Thereupon the district attorney withdrew his offer to put the letter in evidence, but later on in the course of the trial he made another effort to get the letter in evidence, and notwithstanding the fact that the court had previously read the same, stated its contents to the court in the presence and hearing of the jury.

The evidence sought to be shown by the letter was clearly incompetent, and the trial court finally so ruled. The effect of the action of the district attorney in stating the contents of the letter was to anticipate an adverse ruling, and thereby indirectly to get before the jury that which he was not permitted by the law to put directly in evidence. Counsel for the defendant promptly objected to this procedure, but the trial court, instead of condemning it, commended the district attorney by assuring him that he had "a perfect right to make his offer," notwithstanding the fact that the court was already fully informed of the contents of the letter. In view of the attitude of the trial court, it would have been useless to request that the jury be admonished not to pay any heed to the statement of the district attorney. Although we are not convinced that the course pursued by the district attorney contributed materially to the verdict, nevertheless it was an irregularity which should not be permitted to pass unnoticed; for, as was said in the case of *People v. Lee Chuck*, 78 Cal. 317, [20 Pac. 719]: "Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. . . . We make due allowance for the zeal which is the natural result of such a battle as this, and the desire of every lawyer to win his case, but this should be overcome by the conscientious desire of a sworn officer of the court to do his duty and not go beyond it."

At the request of the prosecution the trial court in effect charged the jury not to consider the alleged threat of the deceased to kill the defendant unless that fact had been established in evidence beyond all reasonable doubt. This instruction was clearly erroneous. The defendant in a criminal

case is not required to establish a fact in his favor beyond a reasonable doubt. It is the settled rule that such fact need be proved only by a preponderance of the evidence. (*People v. Coffman*, 24 Cal. 230, 236; *People v. Mitchell*, 63 Cal. 480; *People v. Miller*, 171 Cal. 649, [154 Pac. 468].)

Under the circumstances of the present case the fact that the deceased had threatened to take the life of the defendant was a most material fact in his favor; and we have no doubt but that the instruction complained of, considered in connection with the previous misconduct of the trial judge, resulted in substantial prejudice to the defendant. The effect of such misconduct was, as previously pointed out, to cripple the evidence of the threat, and the effect of the erroneous instruction under consideration was practically to debar the jury from considering that evidence at all.

We have painstakingly examined the evidence produced upon the whole case in an endeavor to sustain the judgment upon the theory that, notwithstanding the errors and irregularities complained of, the conviction of the defendant was not a miscarriage of justice. We cannot conscientiously come to any such conclusion. As we have previously stated, the defense interposed upon behalf of the defendant was, so far as the record before us discloses, a substantial one, and apparently advanced in good faith, and supported by evidence, direct and circumstantial, which merited the serious and unbiased consideration of the jury. On the other hand, the theory of the prosecution that the motive for the killing was not as the defendant claimed, but was to be found in the fact that the deceased rejected the advances of the defendant, was rested, in so far as we have been able to ascertain from the record, largely, if not entirely, upon proof of the fact that upon one occasion the deceased had publicly repulsed and repudiated the defendant.

We do not wish to be understood as intimating that if the defendant had been given a fair trial in accord with the settled and generally well-understood procedure provided by the law, the evidence adduced upon the whole case would not have supported the verdict and judgment. All that we mean to say in this behalf is that we are convinced that the error of the instruction complained of, coupled with the objectionable comments of the trial judge, operated to prevent

the jury from giving that fair and impartial consideration to all of the evidence which the law demands before a verdict can be rightfully reached.

The judgment and order appealed from are reversed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1660. First Appellate District.—February 23, 1916.]

FRED W. FRY, Respondent, v. A. ASTORG, Defendant,
and THE UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY (a Corporation), Defendant and
Appellant; AZUBAH S. BROWN, Intervener.

APPEAL BY ONE PARTY—UNDERTAKING ON APPEAL ON BEHALF OF SEVERAL PARTIES—LACK OF LIABILITY.—Where an appeal is taken by one person and the undertaking thereon purports on its face to be given on an appeal taken by several persons, such undertaking is insufficient to support the appeal, and no recovery can be had against the sureties.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Thomas, Beedy & Lanagan, for Appellant.

Welles Whitmore, for Respondent.

T. J. Sheridan, for Defendant A. Astorg.

William C. Crittenden, for Intervener Azubah S. Brown.

KERRIGAN, J.—This is an appeal from the judgment and from an order denying the motion of the defendant the United States Fidelity and Guaranty Company for a new trial.

Several years ago the plaintiff's assignor, V. A. Hager, commenced an action against A. Astorg, M. Astorg, and F. Ginard to recover possession of certain lands and premises

situate in Lake County, in which action the plaintiff ultimately recovered a judgment against the defendants. Thereafter the defendant A. Astorg gave notice of appeal from the judgment, and filed the undertaking on which this action was brought, which by its language purports to be given in an appeal taken not by Astorg alone, but by all of the defendants in that action. It recites as follows:

"Whereas the defendants in the above entitled action have appealed to the Supreme Court . . . from a judgment made and entered against said defendants; . . .

"Now therefore, in consideration of the premises and of *such appeal*, the United States Fidelity and Guaranty Company . . . does hereby undertake and promise on the part of the appellants that the said appellants will pay all costs and damages which may be awarded against them on the appeal. . . .

"And whereas the appellants are desirous of staying the execution of the said judgment so appealed from in so far as it relates to the delivery of the possession of said lands and premises, the said The United States Fidelity and Guaranty Company does further, *in consideration thereof and of the premises*, undertake . . . that during the possession of such property by the appellants they will not permit or suffer to be permitted any waste thereon, and that if the said judgment appealed from be affirmed, or the appeal dismissed, *they will pay the value of the use* and occupation of the property from the time of the appeal until the delivery of the possession thereof,"

The judgment appealed from was affirmed by the supreme court. Thereafter Fred W. Fry, as assignee of V. A. Hager, commenced this action against A. Astorg and the appellant, recovering judgment against each of them.

The judgment against the appellant must be reversed. It seems to be the settled rule that where an appeal is taken by one person, and the undertaking thereon purports on its face to be given on an appeal taken by several persons, such undertaking is insufficient to support the appeal, and no recovery can be had against the sureties. In the present case it is conceivable that the appellant may have regarded A. Astorg's two codefendants as alone financially responsible, and would not have been disposed to write a bond for him as the sole appellant. The case of *Zane v. De Onativia*, 135 Cal. 440, [67 Pac.

685]. is very like the present one. There only one of several defendants took an appeal from an order denying a motion for a new trial, while the bond in terms recited that it was given as security on an appeal of the *defendants*. The court, after referring to this condition of the record, says: "The sureties undertake upon the part of the appellants (where there is but one appellant) that the appellants will pay all costs and damages which may be awarded against the defendant on said appeal, when costs and damages could only be awarded against the one appealing defendant. Standing upon the strict letter of their contract, the sureties could never be liable for anything upon this undertaking. There never was a joint appeal, and, consequently there never could be an award of damage or costs against the defendants. Moreover, the sureties have agreed to stand responsible only for such damages and costs as might be awarded against the two defendants. It is conceivable that they might have refused to go upon the undertaking had they known that but one defendant had appealed. It is conceivable that they might have regarded the other defendant, who they thought had appealed, as the one financially responsible in the event that the appeal should be lost or dismissed. We are unable to perceive, therefore, how the appeal from the order denying the motion for a new trial can be maintained. Appellant might have filed a new undertaking before the hearing, but this she failed to do. Her request that she now be permitted to file it comes too late."

With some exceptions it is true that the maker of a bond is bound by the recitals in it; but that principle of law is not applicable to the facts of this case, for the appellant here is not denying any of the recitals of the undertaking. It is merely denying, in accordance with the fact, that the bond written by it was to secure an appeal by A. Astorg alone, and contends—and we think correctly—that it has incurred no liability upon such an appeal. This position is consistent with the recitals in the undertaking.

The judgment and order are reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 14, 1916.

[Civ. No. 1487. Third Appellate District.—February 23, 1916.]

POTRERO NUEVO LAND COMPANY, Appellant, v. ALL PERSONS, etc., Respondents.

PARTITION—EFFECT OF DECREE.—A decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title.

ID.—LEASEHOLD INTERESTS IN BEACH AND WATER LOTS OF SAN FRANCISCO—PARTITION SALE—INTERESTS ACQUIRED BY PURCHASERS.—Purchasers at a partition sale of leasehold interests in “beach and water lots” situated in the city and county of San Francisco acquire the interests of such partitioners at the time of sale and nothing more, and the subsequent purchase by one of such purchasers of the reversionary interest of the state in such lots does not inure to the benefit of his copurchasers.

ID.—TITLE OF PURCHASER UPON PARTITION SALE.—The sale under a partition decree is a judicial sale, and the rule in execution sales that the purchaser takes the precise interest of the defendant and that after-acquired title by the seller does not pass to the purchaser is applicable thereto.

ID.—HOLDERS OF ALCALDE DEEDS TO BEACH AND WATER LOTS—TITLE BY ADVERSE POSSESSION.—Title by adverse possession to beach and water lots of the city and county of San Francisco cannot be acquired by holders of alcalde deeds and their successors in interest, as against the purchasers of the reversionary interests of the state therein, as the possession of such holders and that of their successors is under the state grant of the leasehold interest.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. B. V. Sargent, Judge presiding at trial. Bernard J. Flood, Judge denying a new trial.

The facts are stated in the opinion of the court.

A. Everett Ball, for Appellant.

Thomas, Beedy & Lanagan, Nowlin & Fassett, and F. J. Castlehun, for Respondents.

CHIPMAN, P. J.—This is an action to quiet the title to certain real property known as “beach and water lots,” situated in the city of San Francisco. The action is commenced under the so-called McEnerney Act.

Plaintiff alleged that it "is the owner of an estate in inheritance and in the possession actual and peaceable thereof by its tenants or persons holding under it" in certain nine parcels of real property described in the complaint, the same being part of the beach and water lots formerly belonging to the state of California; alleged that, on March 26, 1851, the legislature passed an act granting to the city of San Francisco certain land in said act designated, for the term of ninety-nine years from and after the date of said act (Stats. 1851, p. 37), "except all lands mentioned in said act . . . which had been sold or granted by any alcalde . . . and also registered or recorded in some book of record . . . of the recorder of the county of San Francisco, on or before the 3rd day of April, A. D. 1850," which said lands were by said act "granted and confirmed to the purchaser or purchasers or their grantees aforesaid by the state relinquishing the use and occupation of the same, and her interest in the same, to the said purchasers and grantees . . ."; that the use and occupation of the land described in the complaint for ninety-nine years "were sold and conveyed to various persons, unknown to this plaintiff, and they or their grantees are now the owners and holders of said leasehold interest, which will expire March 26, 1950"; that, on May 18, 1853, the legislature passed an act entitled "An act to provide for the sale of the interest of the state of California in the property within the Water line Front of the city of San Francisco," as defined by the act of March 26, 1851, whereby provisions were made "to sell and dispose of the reversionary interest retained by the state of California after the expiration of the ninety-nine years' use and occupation, conveyed to the city of San Francisco by said act of March 26, 1851, or to those persons mentioned in the exception in said act" (Stats. 1852, p. 219); that by said act of May 18, 1853, five commissioners were to be appointed by the Governor of the state, who should have charge and disposition of said lands at public auction; that said commissioners, acting under said act, sold the land described in the complaint to one John Bensley, and, on February 7, 1855, executed and delivered to him a deed thereof, which was duly recorded and thereby the reversionary interest of the state was duly conveyed to said Bensley, and he thereby became the owner in fee simple thereof, subject to the leasehold interest granted to the said city and to the persons mentioned in the exceptions

in said act of March 26, 1851, for the term of ninety-nine years; that the title so conveyed to said Bensley was, by divers mesne conveyances, conveyed to plaintiff, who is now the owner and holder thereof.

Defendant, California Fruit Cannery Association, answered that, ever since January 1, 1899, "it has been and now is the owner of, and in the actual and peaceable possession in fee simple" of certain parcels of land, being part of that mentioned in the complaint, "and that no other person has any right, title, claim, or interest in or to the same, or any part thereof whatsoever"; this defendant claiming the same adversely against all the world, having paid all the taxes thereon since said date.

Defendant Albert Jacobs pleads a judgment duly made and entered on December 30, 1910, in his favor in an action against "All Persons," establishing his title to one of the parcels mentioned in the complaint; he also pleads title by adverse possession.

Defendant Mathilda Schweitzer alleges that she entered into possession of one of the parcels, mentioned in the complaint, under deed from Chas. C. Bemis and wife, dated June 27, 1893, and for a period of eighteen years immediately preceding the commencement of the action, and ever since said date, has continued in the possession of said premises, paying all taxes levied and assessed upon said land.

There were other lands involved in the action as to which the court made findings and entered its decree in favor of plaintiff, but no question arises as to them in this appeal.

The cause was tried by the court and its findings of fact were: "That plaintiff is not the owner of an estate in inheritance of the property claimed by the defendants who answered as shown above; that the property by these defendants claimed was granted to William C. Parker by T. M. Leavenworth, alcalde, by a grant dated June 24, 1848, and recorded January 7, 1850, . . . and said defendants, by divers mesne conveyances hold the said title of said William C. Parker and ever since the date of the said grant to said William C. Parker, have been and they are now in the actual and peaceable possession of the property claimed by them under said conveyances, and that the said defendants and all of them by their predecessors in interest, went into the possession of the respective lots or parcels of land claimed by them in their

answers filed herein, and they and their predecessors in interest have held and used the same adversely to the whole world, claiming to be the owners in fee simple absolute ever since the date of the said grant to William C. Parker." It is also found that said defendants paid all taxes levied upon said property during all said time. The court found that the legislature passed the acts as set forth in the complaint, and that the use and occupation for ninety-nine years of the lands described in the complaint "were sold and conveyed to various persons, unknown to plaintiff," as alleged; also, that the legislature passed the act of May 18, 1853, and the act of March 26, 1851, as alleged; that five commissioners were appointed by the Governor as provided by the act of May 18, 1853, and said board proceeded under said act to sell, and did sell, at public auction "said reversionary interest of the state of California, to the land described herein, to one John Bensley and thereafter and on the 7th day of February, 1855, made, executed and delivered to him, a good and sufficient deed thereof." It is then found that, on November 3, 1853, said Bensley was the owner of an undivided one-eighth interest in said lands by virtue of said alcalde grant to said Parker and the act of March 26, 1851; that, on that day, November 3, 1853, Bensley and other cotenants holding the same title brought suit in partition against other cotenants, alleging fee-simple title, and, on March 8, 1854, an interlocutory decree was entered by the consent of all parties, in which it was recited that all the parties to the action were seized of the lands mentioned as tenants in common in fee simple, and a referee was appointed to sell said lands; that, on April 3, 1854, said Bensley and all other parties to the action executed and delivered to said referee quitclaim deeds to said property, and, on the same day, the referee made and delivered deeds to the purchasers at the partition sale who are the predecessors in interest of the defendants; that, on October 21, 1854, the report of the referee was filed showing the sale of said property, and on the same day the report was confirmed and the referee directed to make the conveyances and receive the money; that, on March 3, 1855, the final report of the referee was filed, confirmed, and the referee discharged.

It is then found that, on October 26, 1854, said Bensley bought, at public auction, the state title described in the complaint, under the act of March 26, 1851, and, on February 7,

1855, the commissioners appointed under said act "delivered the deed to the said property to the said John Bensley and thereafter said John Bensley conveyed whatever right, title or interest he had in said lands to plaintiff's predecessors in interest and they in turn by mesne conveyances, conveyed whatever right, title or interest they had received from said John Bensley to the plaintiff herein."

The foregoing of the findings cover all the controverted questions.

As conclusions of law, the court found that plaintiff has no right, title, interest, or estate in the lands claimed by the above-named defendants, and the latter are owners in fee simple of the lands claimed by them respectively.

Judgment was accordingly entered, from which and from the order denying its motion for a new trial plaintiff appeals.

Appellant states the point at issue thus: "If the court below was correct in holding that the purchasers at the partition sale obtained by virtue of the referee's deed in partition, the after-acquired title of Bensley, then our appeal must fall, but if the court was in error in that regard, then we must prevail."

Respondents contend that they had possession under the alcalde deed to Parker and under claim of right prior to the act of March 26, 1851, and were in possession when the act passed, and have ever since that time continued their possession actually, openly, and adversely to all the world. In short, they claim that the grant to Parker has ripened into a fee-simple title by adverse possession.

They claim, furthermore, that the purchase of the leasehold interest in the property at the partition sale by their predecessors in estate carried with it the title to the reversion afterward purchased by Bensley—that his purchase inured to their benefit.

The controversy relates exclusively to the claim of plaintiff to the reversion formerly belonging to the state purchased by Bensley after the partition sale.

Bensley and his cotenants brought an action to have their interests partitioned and sold. The interest so claimed by them arose "by virtue of said alcalde grant to Wm. C. Parker, and the act of March 26, 1851." In their complaint they alleged title in fee simple, and in the interlocutory decree in the action it was recited "that the parties to this action are

seized of and entitled to the lands or lots mentioned in the complaint as tenants in common thereof in fee simple." It seems to be conceded, however, that this interest was a leasehold interest to which these cotenants became entitled under the act of March 26, 1851, by reason of having a conveyance from the alcalde and thus coming within the exceptions of that act. While, therefore, they alleged a fee simple and the decree recited that they were "tenants in common in fee simple," the fact was that the interest sold by the referee was the leasehold mentioned in the statute. This is shown by the subsequent sale of the reversion to Bensley, which defendants insist inured to their benefit, and in fact, if true, would have resulted in giving them the complete title.

The form of deed executed by the referee, set out in the transcript, is quitclaim, and purports only to convey "all the right, title and interest in and to the same which the first party (referee) now has." All the cotenants had previously conveyed their interest by quitclaim to the referee, and this interest arose out of the act of 1851.

"It is well settled that a decree of judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title. After the partition each had precisely the same title which he had before." (*Wade v. Deray*, 50 Cal. 376, 380; *Freeman on Cotenancy*, sec. 531; *Love v. Blauw*, 61 Kan. 496, [78 Am. St. Rep. 334, 48 L. R. A. 257, 59 Pac. 1059].) Mr. Freeman, in explanation, says: "The truth is that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of anyone not actually or constructively a party to the suit; but it operates by way of estoppel; . . . it divests all titles held by any of the parties at the institution of the suit." (*Freeman on Cotenancy*, sec. 531.) The state was not a party to this action, and as the owner of the reversion or remainder, it was not bound by the decree. The leasehold alone was the title in issue.

Did the purchase of the reversion by Bensley, one of the cotenants in partition, inure to the benefit of the other cotenants or the purchasers at the partition sale? We think it did not.

On April 3, 1854, Bensley and his cotenants quitclaimed to the referee, "and on the same day the said referee made and executed sufficient deeds (by quitclaim) to the purchasers at



the partition sale who are the predecessors in interest of defendants," as was found by the court. One of these deeds, put in evidence by defendants, executed by the referee, is dated "April 3, 1854, recorded May 30, 1854, in Liber 39 Deeds, page 382. Consideration \$390." The record states "that similar deeds of said referee were made to the predecessors of defendants conveying all the property claimed by defendants." Subsequently, October 21, 1854, the referee made his report "showing a sale of said property, and on the same day the report was confirmed and the referee directed to make the conveyances and receive the money." He had, however, already made and delivered the deeds and received the money, and by the order of the court his acts were confirmed. On October 26, 1854, Bensley "bought, at public auction, the state title to the property described in the complaint herein, under and by virtue of the provisions of the act of . . . the 26th day of March, 1851, and on February 7, 1855, the commissioners appointed under and by virtue of the provisions of said act delivered the deed to the said property to the said John Bensley and thereafter said John Bensley conveyed whatever right, title or interest he had in said lands to plaintiff's predecessors in interest and they in turn, by mesne conveyances, conveyed" this interest to plaintiff.

"The estoppel arising from judgments is usually, if not universally, confined to rights held by the parties to the suit, and which they could not, if so disposed, have asserted. . . . The same rule has been adjudged to be equally applicable to judgments in partition. Hence, a party to a partition who subsequently acquired a new and independent title—one that in no way was represented by any of the parties to the partition—was permitted to successfully assert such title when it proved to be paramount to the one involved in the partition suit." (Freeman on Cotenancy, sec. 532.)

In the case of *Rupert v. Jones*, 119 Cal. 111, [51 Pac. 26], plaintiff was permitted to quiet his title against an execution sale made while he was in possession under a pre-emption claim, by showing patent from the United States issued after the date of the sale of the right or title levied upon, holding, as was held in *Thrift v. Delaney*, 69 Cal. 188, 192, [10 Pac. 475], and other cases, that the after-acquired title did not pass by the sale. *Jameson v. Hayward*, 106 Cal. 682, [46 Am. St. Rep. 268, 39 Pac. 1078], was a partition case in which the



rights involved arose out of the act here being considered—the act of 1851. Plaintiff was the owner of an undivided one-tenth of an estate for years, to wit, ninety-nine years, in and to two of the three lots; one George Brown owned an undivided tenth interest of like estate in the third lot; Hayward owned a like estate in nine-tenths in all three lots, and he also was the owner of the whole of the remainder or reversion, after the termination of said estate of ninety-nine years. The trial court refused to ascertain and settle the proportionate value of the future estate of Hayward, and entered its decree ordering the sale of the estate for ninety-nine years and refusing to order a sale of the reversion. On appeal the judgment was affirmed. The court said: “The estate for years, in which all the parties have an interest, has nearly a half a century to run. Plaintiff and Brown have no interest, legal or equitable, in the reversion, and no reason is perceived why a court, proceeding upon equitable principles, should enforce, at their request, the sale of the reversionary interest which does not concern them.” It was urged by appellants that when the estate for years and the reversion vested in Hayward, there was a merger, and that, as to him, the estate for years had ceased to exist. After citing cases holding that “the principles of equity will permit or prevent a merger, as will best subserve the purposes of justice and the actual and just interests of the parties,” the court said: “In the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent so to do will ordinarily be implied. Such is the rule enunciated in the cases cited *supra*.”

Had Bensley purchased the reversion before the partition suit was begun and had objected, his interest could not have been sold. We can perceive no reason why by mere operation of law, so to speak, this reversion, subsequently acquired, can, in effect, be incorporated in the decree. In the case here there is no claim that fraud, accident, or mistake or other ground exists which would alone justify the assumption that it was the intention of the parties or the court in its decree to include the after-acquired title of Bensley. Beyond question the sale under a partition decree is a judicial sale, and we can see no reason why the rule in execution sales does not apply, and the rule there is that the purchaser “takes the precise



interest of the defendant. An after-acquired title by the judgment debtor does not pass to the purchaser." (*Frink v. Roe*, 70 Cal. 296, 302, [11 Pac. 820].)

It remains to inquire whether or not defendants' alleged adverse possession conferred title to the reversion. The court in effect so determined, for it found that defendants, by their predecessors in interest and by themselves, have been in the actual, open, continuous, and adverse possession of the lots from the date of the alcalde deed to Parker, claiming to be the owners in fee simple.

Among the stipulations or admissions found in the record is the following: "It is also admitted that the said defendants by divers mesne conveyances hold the title conveyed to Wm. C. Parker by the alcalde deed of the property claimed by them, and that said Wm. C. Parker ever since the date of his deed and his grantees and said defendants have been and now are in the actual and peaceable possession of said lands claimed by them under said alcalde's deed *and the act of March 26, 1851.*"

In the case of *Chapin v. Bourne*, 8 Cal. 294, one of these alcalde deeds—Leavenworth, alcalde, to Wm. C. Parker—was before the court. The right of the party claiming under it turned upon the fact that there was no evidence of its recordation as required by the act of 1851, and hence the grant to Parker passed to the city of San Francisco, and the commissioners, under the act of 1853, could only sell the reversion. Speaking of the grant to Parker, the court said: "At the time when Leavenworth made the grant to Parker, the pueblo of San Francisco had no title whatever to the water property; it belonged to the United States, who held it in trust for any new state that might be erected out of said territory, and passed to the state of California on her admission, by virtue of her sovereignty. The grant was therefore a nullity. On the 26th of March, 1851, the legislature passed an act granting to the city of San Francisco, for the term of ninety-nine years, certain property known as the beach and water lot property, of which this is a part. The act contained a reservation, in favor of those claiming under alcalde grants and city sales. Such titles were confirmed to the then holders, provided such conveyances were registered and recorded in some book of record on or before the third day of April, 1850, which book was in the possession and under the control of the re-

corder of San Francisco, at the date of the passage of the act."

Another of the Leavenworth-Parker deeds was before the court in *Seabury v. Arthur*, 28 Cal. 143. The question there was as to the priority of one of two alcalde deeds to the same beach and water lot. That of Leavenworth to Parker was dated September 25, 1848; the other was by Alcalde Geary to one Sprague, made on January 3, 1850, and the Parker title was held to have priority. Speaking of the two grants the court said: "The last sale had no greater validity than the first; and it equally required the confirmatory grant of the legislature to give it validity."

Concededly, the interest thus granted or confirmed by the state was a leasehold interest for ninety-nine years, and nothing more, the state reserving the reversion or remainder, for the sale of which it made provision by the act of 1853. We think it must follow that Parker's possession and that of his successors in interest was, under this state grant, that of a leasehold interest. His deed had no validity other than that derived from the act of 1851. Having claims, as we have seen, under both the Parker deed and the act of 1851, it must be presumed that he was, after confirmation, holding under a valid grant rather than an invalid one. (*Wood v. Curran*, 99 Cal. 137, 142, [33 Pac. 774].) The statute of limitations did not run against the state while the state held the title prior to the grant under the act of 1851. Having entered under the state grant, the statute did not run against the remainder while the state held that interest. Did it begin to run against the holder of the remainder after its purchase by Bensley?

As Parker was holding under the state by virtue of the act of 1851, the case of *Millett v. Lagomarsino*, 107 Cal. 102, [40 Pac. 25], and like cases cited by defendants, do not apply. It was there contended that Millett entered into possession as a tenant, and could not initiate an adverse possession without first surrendering possession to his landlord. The court said: "The rule that it is necessary to surrender possession and again enter, before the possession can become adverse, obtains only where the person claiming to hold adversely was put into possession by the owner, or has at least had possession under such owner. No such relation ever existed between Millett

and Tenney." Here, as we have seen, Parker held under the leasehold interest vested in him by the statute of 1851.

Defendants rely upon *Tewksbury v. Magraff*, 33 Cal. 237. It was there laid down as the general rule that a tenant cannot dispute his landlord's title. This general rule, however, was said to be subject to several exceptions. One of these, the exception relied upon here, is thus stated in the opinion: "So if the tenant did not take possession under the lease, but was in possession at the time he took the lease, he may dispute the landlord's title without first surrendering the possession; for not having received the possession from him, he is under no moral or legal obligation to restore it before assuming a hostile attitude."

It is true that in this case Parker went into possession before he obtained his lease under the act of 1851, but, as was held in *Chapin v. Bourne*, 8 Cal. 294, the lot then belonged to the United States, holding it in trust for the state to which it passed upon being admitted into the Union. By continuing his possession under the act of 1851, he accepted the relation thereby created, which was, as we hold, that of landlord and tenant. In the *Tewksbury* case the court held (page 246) that if the possession was taken by virtue of the lease, the tenant could not rely upon a title afterward acquired to defeat recovery.

As a general rule, the possession of the tenant is that of his landlord, and will be so deemed until the contrary appears, and this rule affects all who may succeed to the possession, immediately or remotely, through or under the tenant. Hence, so long as the relation of landlord and tenant exists, the tenant cannot acquire an adverse title as against his landlord. (1 R. C. L., p. 746.)

Possibly some doubt is cast upon the relationship existing between the holder of the leasehold interest under the act of 1851 and the holder of the remainder under the act of 1853, by the case of *Potrero Nuevo Land Co. v. All Persons*, 158 Cal. 731, [112 Pac. 303], first decided in department two. In that case plaintiff's title came down to it through John Bensley, as it did in the present case. In department, speaking through Mr. Justice Melvin, the court said: "The state having disposed of the fee, subject to the use and occupation for ninety-nine years, its grantees or their ultimate successors in interest occupy the exact position of ownership

formerly held by the state. . . . We see no logical escape from the doctrine that the relation of landlord and tenant exists; that the possession of the latter is that of the former; and that appellant has the right to maintain the action." On rehearing Justices Henshaw and Lorigan, who signed the department decision, reached a different conclusion, holding "that the relation of landlord and tenant, within the meaning of the McEnerney Act, does not exist between the holder of the reversionary fee and the holder of the ninety-nine year term in the beach and water lots of the city and county of San Francisco. And as the McEnerney Act contemplates 'adverse possession' either by plaintiff, by his tenant, or by some person holding under him, and as plaintiff's possession is based wholly upon that of his asserted tenant for years, since such tenancy does not exist, it necessarily follows that plaintiff does not come within the provisions of the act and is not entitled, therefore, to maintain this action." Three justices, Shaw, Angellotti, and Sloss, concurred in the judgment "solely on the ground that the affidavit accompanying the complaint is defective." They held, however, that plaintiff could maintain the action. In the concurring opinion written by Mr. Justice Shaw it was said: "One who holds a particular estate for years by grant is, by a very common use of language, said to be holding under his grantor, although there is no obligation to pay rent. In like manner, he would be holding under the grantee of the remainder. Such remainderman would be entitled to take advantage of the act to establish a record title to the remainder." Justice Melvin, of department two, adhered to his original opinion.

But whether or not the technical relation of landlord and tenant existed as understood by law-writers, it is very certain that Bensley was a remainderman. It was said, in *Pryor v. Winter*, 147 Cal. 554, 557, [109 Am. St. Rep. 162, 82 Pac. 202], "It has been universally held that the estate of a remainderman is distinct from that of a tenant of a preceding particular estate, and cannot be in any way affected by any act of the particular tenant or his grantee." Quoting from *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390, 402, the opinion continues: "Neither a descent cast, nor the statute of limitations will affect a right, if a particular estate existed at the time of the disseizin, or when the adverse possession began, because a right of entry in the remainderman cannot

exist, during the existence of the particular estate; and the laches of a tenant for life will not affect the party entitled." Quoting further from Tiedeman on Real Property (paragraph 400): "The statute of limitations does not begin to run until the remainder takes effect in possession." (See 1 R. C. L., p. 743, and note.)

We do not think the evidence supports the findings, nor do we think the correct conclusions of law were drawn from the findings. Our conclusion is that the finding that plaintiff is not the owner of an estate in inheritance of the property claimed by defendant is not supported by the evidence, nor is the finding that defendants are owners in fee simple of said lands claimed by them respectively.

The judgment and order are reversed.

Hart, J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 24, 1916, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 20, 1916.

[Civ. No. 1573. First Appellate District.—February 24, 1916.]

JOHN LUCHINI, Respondent, v. A. ROUX et al., Co-partners, etc., Appellants.

DAIRY ACT—FAILURE TO REGISTER DAIRY—VALIDITY OF CONTRACTS FOR SALE OF MILK—MAINTENANCE OF ACTIONS—CONSTRUCTION OF STATUTE.—An owner of a dairy where more than four cows are milked is not prohibited from maintaining an action for the sale of milk on the theory that the contract for the sale was void because of the failure of such owner to register his dairy with the state dairy bureau, as required by sections 6 and 16 of the Dairy Act (Stats. 1911, p. 959), as such act does not prohibit the sale of milk which is pure and wholesome, from an unregistered dairy, but merely makes the failure to register a misdemeanor.

ID.—ACTION FOR MILK SOLD—CAPACITY TO SUE—SUFFICIENCY OF FINDINGS.—In an action to recover for the sale of milk by the owner of an unregistered dairy, the finding "that the sale of milk . . . was not a wrongful sale within the meaning, or in violation of

sec. 16, or of sec. 29, or of sec. 6, or of any section whatever of the Act of the Legislature, etc.," sufficiently covers the issue raised by the allegations of the answer as to the lack of legal capacity in the plaintiff to sue by reason of his omission to register his dairy as required by the statute.

APPEAL from a judgment of the Superior Court of Marin County, and from an order denying a new trial. Edgar T. Zook, Judge.

The facts are stated in the opinion of the court.

James F. Brennan, and John A. McGee, for Appellants.

Martinelli & Greer, for Respondents.

KERRIGAN, J.—This action was brought by plaintiff, who was a dairyman, upon two causes of action for the recovery of the sum of \$1,609.55. The first was for the sum of \$1,339.49 upon an account stated, and was based upon the sale of milk, wood, horses, hogs, and hay. The second was for milk delivered to the defendants by plaintiff at an agreed price of \$270.06.

Defendants, who were cheese manufacturers, in answer to the first cause of action, denied that an account was ever stated, or that they ever promised to pay the plaintiff any balance due; and further denied that there was due from them any sum whatever upon the second cause of action.

As a separate and distinct defense to both counts, defendants alleged that the plaintiff had no legal capacity to sue upon or maintain the alleged cause of action, for the reason that he had failed to comply with the provisions of sections 6 and 16 of the so-called Dairy Act, requiring those engaged in the dairy business to register as provided by the act; and that the sales, in so far as the milk was concerned, were wrongful within the meaning of the act, and that no recovery could be had therefor.

The court found that the milk respecting which an account was stated was not adulterated, and that the sale was not wrongful within the meaning of the act, and rendered judgment in favor of the plaintiff and against the defendants in the sum of \$1,339.49, the full amount alleged to be due upon the account stated. It further decreed that plaintiff take nothing upon his second cause of action.

Defendants appeal from such judgment, and from the order denying a new trial.

The main contention upon which the defendants rely for the reversal of the judgment and order is that plaintiff is not entitled to recover the amount of the account stated for the reason that he did not register his dairy with the state dairy bureau as provided by the Dairy Act (Stats. 1911, p. 959). The sections involved as a defense are as follows:

"Sec. 6. Every person, firm or corporation operating any dairy, where more than four cows are milked, and every creamery, cheese factory, receiving station, skimming station, ice cream or ice milk manufacturer, or milk condensary, shall on or before the first day of November of each year, cause to be registered with the secretary of the state dairy bureau a statement showing the full name and address of such person, firm or corporation so operating the same, and also the full name and address of the owner or owners of the business so being operated, in case the person operating the same is not the owner, together with a statement of the class of such business carried on by such person or corporation, and the number of cows then being milked, in case of a dairy."

"Sec. 16. No action can be maintained on account of any sale or other contract made in violation of, or with intent to violate, this act, by or through any person, who was knowingly a party to such wrongful sale or other contract."

"Sec. 29. Milk and the products of milk enumerated in this section shall be deemed adulterated within the meaning of this act if it or they shall not conform to the following definitions and standards:

"(1) Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen (15) days before and five (5) days after calving, and contains not less than three (3.0) per cent of milk fat, and not less than eight and five-tenths (8.5) per cent of solids, not fat."

"Sec. 41. Whoever shall violate any of the provisions of this act other than sections 9 to 35, both inclusive, and section 37 (the punishment for which is provided in sections 39 and 40 hereof) shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than two hundred dollars or by imprisonment in the county jail for a period of not less than



ten days nor more than one hundred days, or by both such fine and imprisonment."

In addition to the above enumerated sections there are provisions in the act prohibiting the sale of impure, unclean, or unwholesome milk, or milk produced in an unsanitary dairy. An unsanitary dairy is also defined at length. Other provisions of the act deal with the manufactured products of milk, their preparation for the market, the character of packages in which they may be offered for sale, and the labels that may be placed thereon. Still other provisions of the act require substitutes for butter and cheese to be branded—in short, the act contains comprehensive regulations having to do with the production of milk, its sale, the manufacture of products therefrom, and the method of marketing and sale to the public, the whole being designed to protect the public health and promote its well-being in so far as they depend upon the purity and wholesomeness of the important articles of consumption dealt with by the act. We also find in the act various sections similar to section 41 above set forth, making violations of the act misdemeanors, and affixing punishments to them in the shape of fines and terms of imprisonment of various amounts and durations; and, finally, we have section 16 of the act, also set out above, providing that no action can be maintained on account of any sale made in violation of the act.

The contention of the appellants that the contract in this case is void is not based upon the character of the milk delivered under it, but is squarely founded upon the fact that the plaintiff had not complied with section 6 of the statute, requiring registration.

So far as this branch of the appellant's argument is concerned, the milk sold by the plaintiff might have been of the most wholesome character, and unexcelled by any to be obtained anywhere; their contention simply is that coming as it did from an unregistered dairy, a contract for its sale was a violation of the act.

We are unable to agree with this contention. We find nowhere in the act any prohibition of the sale of milk from an unregistered dairy as such. If it is impure or unwholesome or produced in an unsanitary dairy, then its sale is prohibited along with that of milk of the same character produced in a registered dairy, and a contract for its sale would come within

the terms of section 16 of the act. The violation of the statute by the failure of the owner or operator of a dairy where more than four cows are milked to register is, by section 41 thereof, made a misdemeanor punishable by fine and imprisonment; and nowhere in the statute is the sale of its products forbidden if pure and wholesome. The proposition that if an act is prohibited by law a contract for its performance is invalid is undoubtedly correct; but in applying this principle to the case at bar the appellants are confounding plaintiff's failure to register (made a misdemeanor and punishable as such) with the contract he entered into for the sale of his milk. They seek to draw the inference that because plaintiff was guilty of a misdemeanor in failing to comply with the terms of the act requiring registration, a contract for the sale of his milk was a violation of the statute. We think no such inference can be drawn. A specific penalty is annexed to the failure to register by the owner or operator of a dairy of the character here involved, and this court cannot by inference annex an additional punishment for such failure. The sale under consideration not being a violation of the act, the plaintiff was not inhibited from maintaining this action.

The cases cited by the appellants on this question are not in point. In each case the sale itself was by the statute in terms made invalid, except in the case of *Müller v. Post*, 1 Allen (Mass.), 434, which was a case arising under a statute which made it a misdemeanor to use an unsealed can in the sale of milk. The court held that such an enactment was equivalent to making the sale of the milk itself in an unsealed can unlawful; but that case does not go to the extent claimed by the defendants.

It is next contended in support of the appeal that the finding of the trial court of an account stated between the parties is not supported by the evidence. An examination of the record discloses a conflict of testimony upon this subject, in view of which this court is required to uphold the judgment of the trial court.

The appellants next urge that the court erred in failing to find upon material issues raised by the answer to the first cause of action. The issues referred to were raised by allegations of the amended answer to the effect "that the plaintiff had no legal capacity to sue . . . in this: that the plaintiff has not complied with the provisions of secs. 6 and 16 of an

act of the Legislature etc." (reciting the statute under consideration); and "that the sale of milk . . . was a wrongful sale within the meaning, and in violation of sec. 16 and sec. 20 and sec. 6 of an act of the Legislature etc." (reciting the same act). Finding IV as made by the court is "That the sale of milk . . . was not a wrongful sale within the meaning, or in violation of, sec. 16, or of sec. 29, or of sec. 6, or of any section whatever of the Act of the Legislature etc." This finding was clearly intended to and, we think, does cover the issues now referred to.

Appellants finally complain that the court failed to find upon the issues raised by their answer to the second cause of action; but as the judgment of the court is that the plaintiff take nothing by this cause of action, and the decree recites that the plaintiff waived in writing any findings of fact thereon, we fail to see how the appellants are aggrieved by the absence of findings upon this count.

This disposes of the points urged by appellants in support of the appeal. For the reasons given the judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1688. First Appellate District.—February 25, 1916.]

HENRY MEINBERG, Appellant, v. CATHERINE E. JORDAN et al., Respondents.

NEW TRIAL—APPEAL—DISCRETION OF TRIAL COURT.—An order granting a new trial will not be disturbed upon appeal save upon a showing of an abuse of the discretion vested in the trial court.

ID.—AFFIRMANCE OF ORDER—MOTION UPON SEVERAL GROUNDS.—An order granting a new trial must be affirmed without regard to the ground upon which it is specifically based if it could be rightfully granted upon any of the grounds upon which the motion was made, subject, however, to the exception that in passing upon the correctness of the order the appellate court may not consider the insufficiency of the evidence when the lower court by direct language expressly excludes such ground as a basis for its order.

ID.—EXCESSIVE DAMAGES—IMPLICATION OF INSUFFICIENCY OF EVIDENCE.—An order granting a new trial in an action for damages

for personal injuries upon the sole ground that the damages awarded to the plaintiff are excessive does not fall within the exception to the rule, but implies that the motion was granted upon a consideration of the insufficiency of the evidence to support the verdict.

ID.—INSUFFICIENCY OF EVIDENCE—QUESTION FOR TRIAL COURT.—Upon a motion for a new trial in an action for damages for personal injuries, the probative force and effect of the evidence as to the nature and the extent of the injuries, and the damages resulting therefrom, is for the determination of the trial court, notwithstanding there is no conflict in the evidence.

ID.—ACTION FOR PERSONAL INJURIES—ASSAULT AND BATTERY—EXCESSIVE DAMAGES—ORDER GRANTING NEW TRIAL—DISCRETION NOT ABUSED.—In this action for damages for personal injuries sustained as the result of an assault and battery, it is held that no abuse of discretion was committed in granting the motion for a new trial on the sole ground that the verdict in the sum of \$750 was excessive.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. **Franklin A. Griffin, Judge.**

The facts are stated in the opinion of the court.

Perry & Dailey, for Appellant.

Jordan & Brann, for Respondents.

LENNON, P. J.—In this action the plaintiff recovered a judgment upon the verdict of a jury against the defendants in the sum of \$750, as damages for personal injuries alleged to have been inflicted upon the plaintiff as the result of an assault and battery committed upon him by the defendant Catherine E. Jordan, wife of the defendant F. J. Jordan. The appeal is from an order granting the defendants' motion for a new trial upon "the sole ground that the damages awarded to the plaintiff . . . are excessive."

It is the well-settled rule that an order granting a new trial will not be disturbed upon appeal save upon a showing of an abuse of the discretion vested in the trial court. The defendants' motion for a new trial in the present case was based upon all of the statutory grounds; and it is equally well settled that an order granting a new trial must be affirmed without regard to the ground upon which it is specifically

based if it could be rightfully granted upon any of the grounds upon which the motion was made. The latter rule is subject to the exception that in passing upon the correctness of the order granting a new trial the appellate court may not consider the insufficiency of the evidence when the lower court "by direct language" expressly excludes that ground as a basis for its order. (*Newman v. Overland etc. Ry. Co.*, 132 Cal. 74, [64 Pac. 110]; *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, [75 Pac. 332]; *Gordon v. Roberts*, 162 Cal. 506, [123 Pac. 288]; *Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 127, [138 Pac. 712].) The order appealed from in the present case does not fall within the exception stated. It neither expressly nor impliedly excludes the insufficiency of the evidence as one of the grounds for its making. To the contrary, the reason assigned for its making implies that it was granted upon a consideration of the insufficiency of the evidence to warrant and support the finding of the jury that the plaintiff had been damaged in the sum of \$750.

The declaration of the court that such sum was "excessive" does not necessarily mean that the trial court was of the opinion that the verdict was the result of passion or prejudice. It is susceptible of the interpretation that the trial court was not satisfied that the finding of the jury as to the extent of the damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case.

Conceding, as plaintiff's counsel contends, that there is no conflict in the evidence as to the nature and extent of the injuries and the damages resulting therefrom, nevertheless the probative force and effect of the evidence upon that phase of the case was ultimately for the determination of the trial court upon the hearing of the motion for a new trial; and in the absence of a showing of an abuse of discretion its order granting a new trial will not be disturbed by this court. The rule in this behalf is stated in the case of *Otten v. Spreckels*, 24 Cal. App. 251, 257, [141 Pac. 224], where it is said that "Even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to one or the other of the litigants, the question of the probative force or evidentiary value of the testimony in a proceeding on a motion for new trial based upon the ground that the evidence is insufficient to justify the verdict is one whose determination is with the trial court. The rule (elementary

and commonly familiar in our system of jurisprudence) is that the plaintiff in a civil action must establish his cause by a preponderance of proof; but although many witnesses may testify directly in favor of his position, and no adversary testimony directly adduced, it is still with the jury, in the first instance, and finally with the court, where a new trial is asked on the ground stated, to say whether such testimony, when subjected to the legal tests whereby the probative value of evidence is to be judged, measures up to the requirement of the law as to the degree of proof essential to the support of an issue of fact. Of course, as has frequently been asserted, neither the jury nor the judge, in such a case, can arbitrarily reject testimony received in proof of the ultimate fact, or even declare it to be unworthy of credence, but it is the duty of both, when exercising their respective functions with reference thereto, to consider and dispose of it in the light of the surrounding circumstances of the transaction constituting the subject matter of the litigation; and their action in that regard will not be disturbed on appeal where there appears to flow from the general surrounding circumstances of the case probable justification for discrediting or giving no weight to testimony which, on its face, may bear all the earmarks of probability."

A consideration of the evidence concerning the damage done to the plaintiff by the assault and battery alleged to have been perpetrated upon him at the hands of the defendant Catherine E. Jordan has not convinced us that the order granting a new trial upon the ground stated therein was an abuse of discretion. Moreover, one of the grounds of the motion for a new trial was alleged newly discovered evidence, which, under the rule previously stated, may be considered upon appeal in support of the order, notwithstanding the order specified that it was granted solely upon another ground; and we are not prepared to say that the showing made by the defendant in that behalf was not in itself sufficient to warrant and support the order granting a new trial.

Upon the trial of the cause it was the contention of the plaintiff that the defendant Catherine E. Jordan was the aggressor in the altercation which resulted in the alleged injuries and damage to the person of the plaintiff. The defendants, on the other hand, insisted that it was the plaintiff who precipitated the encounter, and that whatever the defendant

Catherine E. Jordan did in the way of assaulting the plaintiff was done in necessary self-defense. The evidence upon this phase of the case was limited solely to the testimony of the plaintiff and the defendant Catherine E. Jordan. Needless to say, it was in sharp and substantial conflict. The alleged newly discovered evidence, as shown by affidavits filed and considered in support of the motion for a new trial, consisted of the proposed testimony of a witness to the affray, to the effect that the plaintiff, and not the defendant Catherine E. Jordan, was the aggressor therein. No objection is made that the defendants did not make a sufficient showing of reasonable diligence in an effort to discover and produce the newly discovered evidence upon the trial of the case; but it is insisted that such evidence is merely cumulative, and therefore was not sufficient to warrant the granting of a new trial. While it is true generally that newly discovered evidence which is merely cumulative in effect will not suffice to support a motion for a new trial, nevertheless if such evidence, notwithstanding its cumulative character, possesses sufficient probative force to render probable a different result upon a retrial of the case, it will then warrant and require an order granting a new trial. (*Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 127, [138 Pac. 712].) Manifestly, the alleged newly discovered evidence relied upon for a new trial by the defendants in the present case, if it had been produced at the original trial, would have been material to the defense of the defendants; and although it was but corroborative of the testimony of the defendant Catherine E. Jordan, and therefore cumulative in character, still in view of the sharp and substantial conflict in the testimony of the plaintiff and defendant Catherine E. Jordan as to who was the aggressor in the affray, we are not prepared to say that if the newly discovered evidence had been presented to the jury in the first instance, the result of the trial would not have been different.

The order appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 24, 1916, and the following opinion then rendered thereon:



THE COURT.—The application for hearing in this court after decision of the district court of appeal of the first district is denied upon the first ground stated in the opinion of the district court of appeal, namely, that it cannot be held that there was error in the action of the trial court in granting defendants' motion for a new trial upon the "ground that the damages awarded to the plaintiff . . . are excessive."

[Civ. No. 1707. Second Appellate District.—February 25, 1916.]

D. F. HULBERT, Respondent, v. ALL NIGHT AND DAY BANK (a Corporation) et al., Appellants.

CONTRACT—AGREEMENT TO FORM PARTNERSHIP—DEPOSIT OF MONEY BY ONE PARTY IN BANK—FAILURE TO FORM PARTNERSHIP—RIGHT TO RECOVER DEPOSIT.—Where two parties agree to form a partnership for conducting a certain business under a firm name, and it being agreed that each should deposit with a certain bank to the credit of the firm a certain sum, and in pursuance of the agreement one of the parties deposited his amount, but the other party failed to make any deposit, and the partnership was never consummated, and after three years nothing was done toward that end, the depositor of the money is entitled to recover from the bank the money so deposited by him, and while the other party technically should be made a party to the suit, section 4½ of article VI of the constitution should be applied, and the suit should not be defeated because he is not.

ID.—DEPOSIT IN BANK—RIGHT OF OWNER TO SHOW TITLE.—While it is true that a bank receiving a deposit of money may not, in the absence of proper legal proceedings to impound it, dispute the depositor's ownership thereof, or refuse to honor his checks drawn thereon, nevertheless the real and true owner thereof may show his right to the funds.

ID.—JUDGMENT—VALIDITY OF.—Where, prior to the making of findings, a judgment was entered in favor of the plaintiff, but thereafter findings were made, and a second judgment regularly entered, the second judgment is the only one that can be considered, and the first will be assumed to have been vacated.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Benjamin E. Page, Arthur C. Hurt, and Arthur F. Coe,
for Appellants.

Fred W. Heatherly, for Respondent.

SHAW, J.—Some time prior to October 29, 1909, plaintiff and one Frank J. Rogers agreed that they would enter into a copartnership for conducting a business under the firm name "Pacific Buying Company"; it being further agreed that plaintiff should deposit with the defendant All Night and Day Bank, to the credit of the Pacific Buying Company, the sum of one thousand dollars, and that Rogers should deposit the sum of one thousand five hundred dollars to the same account, and plaintiff the further sum of five hundred dollars. In pursuance of this agreement so made with Rogers, plaintiff, on October 29, 1909, deposited one thousand dollars in the All Night and Day Bank to the credit of the Pacific Buying Company, subject to checks thereon signed "Pacific Buying Company, by D. F. Hulbert, by Frank J. Rogers." Rogers never at any time deposited any sum to the credit of said account and the copartnership was never consummated. Some three years later, nothing having been done by Rogers toward carrying out the agreement, and he having, as appears from the record, long before disappeared, plaintiff made demand upon defendant Hellman Commercial Trust and Savings Bank, which had meanwhile assumed all liabilities of the All Night and Day Bank, for repayment of the sum so deposited by him in the name of Pacific Buying Company, the checks against which account were, under the terms of the deposit so made, to be signed, as before stated, by both Rogers and himself. The bank refused to pay the same; whereupon this action was instituted for the recovery thereof. Judgment was rendered for plaintiff, from which, and a denial of its motion for a new trial, defendant appeals.

It conclusively appears from the evidence that the money so deposited to the account of Pacific Buying Company was that of plaintiff; that Rogers contributed nothing whatsoever to it and had no interest therein; that the executory agreement to form a copartnership was never carried out; and no checks were ever drawn upon said fund signed "Pacific Buying Company, by D. F. Hulbert, by Frank J. Rogers." Rogers, as

stated, had absconded, his whereabouts being unknown to plaintiff. His disappearance and his failure for more than three years to comply with his part of the executory agreement should be deemed a repudiation on his part of the agreement to form a partnership. Defendant makes no claim to the money on deposit, and even though its contention that Rogers should have been made a party litigant be technically correct, nevertheless, under the circumstances, the case is one to which the provisions of section 4½ of article VI of the constitution should be applied. While it is true that a bank receiving a deposit of money may not, in the absence of proper legal proceedings to impound it, dispute a depositor's ownership thereof or refuse to honor his checks drawn thereon, nevertheless the real and true owner thereof may show his right to the fund. (*Hemphill v. Yerkes*, 132 Pa. St. 545, [19 Am. St. Rep. 607, 19 Atl. 342]; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, [17 Am. St. Rep. 779, 18 Atl. 632].) The evidence establishing such right should be clear and unequivocal (*Nolting v. National Bank*, 99 Va. 54, [37 S. E. 804], and in this case it, without contradiction, conclusively shows that plaintiff deposited the entire sum of one thousand dollars in the fictitious name of Pacific Buying Company, which was the name agreed upon in contemplation of the formation of a copartnership.

It appears that prior to the making of findings a judgment was entered in favor of plaintiff; that thereafter findings were made by the court, regularly followed by the entry of another judgment. This fact is also assigned as error. In *Colton L. & W. Co. v. Swartz*, 99 Cal. 278, [33 Pac. 878], it is said: "There can be but one judgment in a judgment-roll, . . . if two are found therein the last in point of time is the only one which can be considered as a part thereof. . . . If necessary, therefore, it will be assumed that the former judgment was vacated."

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1732. Second Appellate District.—February 25, 1916.]

R. G. ROBERTS, Respondent, v. THE JUSTICE'S COURT OF LOS ANGELES TOWNSHIP, COUNTY OF LOS ANGELES, and J. W. SUMMERFIELD, Justice Thereof, Appellants.

JUSTICE'S COURT—JURISDICTION—VACATING JUDGMENT BY DEFAULT—CERTIORARI.—A justice's court has no jurisdiction to set aside a judgment by default, basing its order upon evidence other than the docket and the papers on file, and an order thus made will be annulled on *certiorari*.

ID.—SUMMONS—FAILURE TO SERVE AND RETURN WITHIN THREE YEARS.—A justice's court is not deprived of jurisdiction because of the failure to make service of summons and return within three years from the commencement of the action.

ID.—DEFAULT JUDGMENT—SERVICE OF SUMMONS OUTSIDE COUNTY—RECORD—SILENCE AS TO RESIDENCE OF DEFENDANT—JUDGMENT NOT VOID ON FACE.—A justice's court judgment is not void on its face because of the absence of any affirmative statement therein, or in the return of summons, that the defendant resided in the county in which he was served, or that at the time of the commencement of the action he was a resident of the county in which the action was brought, where it appears from the allegations of the complaint that the written order upon which the action was based was entered into and to be performed in the county in which the action was brought.

ID.—IMPROPER SERVICE OF SUMMONS—SETTING ASIDE JUDGMENT—BURDEN OF PROOF.—Upon a motion to set aside a judgment rendered by default upon a service of summons in violation of the provisions of subdivision 2 of section 848 of the Code of Civil Procedure, the burden of proof is upon the defendant to show that he was not a resident of the county in which he was served.

APPEAL from an order of the Superior Court of Los Angeles County annulling an order of the Justice's Court of Los Angeles Township, in Los Angeles County, vacating and setting aside a default judgment. J. P. Wood, Judge.

The facts are stated in the opinion of the court.

Maltman & Clark, and James L. Patten, for Appellants.

Thomas C. Ridgway, and Julius V. Patrosso, for Respondent.

CONREY, P. J.—*Certiorari*. This is an appeal from an order of the superior court annulling an order of the justice's court of Los Angeles township, in Los Angeles County, vacating and setting aside a default judgment theretofore entered in the justice's court in an action entitled *Roberts v. Francis*. The complaint in that action was filed and summons duly issued on October 14, 1910. On February 21, 1914, a certificate, in due form to authorize service in another county, was attached to the summons by the clerk of the superior court of Los Angeles County. On March 18, 1914, the summons was filed in the justice's court, with a return showing that the summons and copy of complaint were served on the defendant in the county of Imperial on the twenty-fifth day of February, 1914. The time limited for the appearance of a defendant in a justice's court where he has been served outside the county in which the action is brought is twenty days. (Code Civ. Proc., sec. 845.) No appearance having been made in that action, judgment by default was entered on the twenty-first day of March, 1914. On July 18, 1914, pursuant to notice theretofore served on plaintiff's attorney, the defendant presented a motion in the justice's court for an order setting aside the judgment and that the action be dismissed, and said motion was granted. The grounds of the motion were as follows: "That the court at the time said judgment was rendered had not jurisdiction of the person of the defendant and that jurisdiction of the person of the defendant cannot be had in said action for the following reasons: 1. No copy of the complaint was ever served upon defendant; 2. The name of the attorney who appeared for plaintiff was not indorsed upon the copy of the summons served upon the defendant; 3. Service of summons was not had upon the defendant within three years from the commencement of the action. The motion will be made upon the docket entries in said cause, the papers, pleadings, records, and files therein, and upon oral testimony and documentary evidence to be produced at the hearing of the motion." Thereafter plaintiff filed his petition in the superior court for a writ of review, and on the return to that writ the facts appeared as hereinabove stated. The defendants appeal from the superior court's order annulling said order made July 18, 1914, in the justice's court.

In section 859 of the Code of Civil Procedure it is provided that a justice's court may, on such terms as may be just, "relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor." The motion made and granted on July 18th was not supported by affidavit, and was not made upon any of the grounds referred to in section 859. Appellants insist that although the motion was not made within the time nor for any reason specified in section 859, the justice had power to make the order because the judgment was void upon its face. This contention as to a void judgment finds support in some of the decisions. (*American Type Founders Co. v. Justice's Court*, 133 Cal. 319, [65 Pac. 742, 978]; *Newman v. Barnet*, 165 Cal. 423, [132 Pac. 588].) The principle recognized in these cases is that since, in contemplation of law, a judgment which by mere inspection of the record is shown to be void is no judgment at all, an order of a justice purporting to set aside such a judgment may be said to be nothing more than a correction of his docket, so as to specifically and affirmatively state the fact already appearing, that there is no such judgment. That this may be done by a superior court is settled beyond question. (*Grannis v. Superior Court*, 146 Cal. 245, [106 Am. St. Rep. 23, 79 Pac. 891].)

On the other hand, respondent relies upon a line of decisions wherein the authority of a justice of the peace to set aside a judgment rendered by him is denied. The rule as stated in these cases is based upon the fact that justices' courts are of narrowly limited jurisdiction. (*Winter v. Fitzpatrick*, 35 Cal. 269; *Weimmer v. Sutherland*, 74 Cal. 341, [15 Pac. 849]; *Simon v. Justice's Court*, 127 Cal. 45, [59 Pac. 296].) "Inferior courts cannot go beyond the authority conferred upon them by the statute under which they act. They can assume no power by implication, and must keep within the power expressly given." So it was determined that a justice's court cannot take any judicial action modifying or recalling any of its judgments, except in the specific instances where such power is given by statute.

In *Storey v. Mueller*, 21 Cal. App. 301, [131 Pac. 763] it is

said that *Winter v. Fitzpatrick*, 35 Cal. 269, was "a case wherein the statutory time had not elapsed between the service of summons and the rendition of the judgment." If this were so, the judgment, which was by default, necessarily would have been void; but if we refer to the terms of the Practice Act in force at the time of rendition of the judgment which was under review in *Winter v. Fitzpatrick*, we find that that judgment was not necessarily void. Section 541 of the Practice Act, as amended in 1854 (Stats. 1854, p. 67), was not again amended until March 30, 1868. (Stats. 1867-68, p. 551.) The proceedings under review in *Winter v. Fitzpatrick* occurred in January and February, 1868. Under the terms of section 541 of the Practice Act as then in force, the summons might have required the defendant to appear on a day earlier than the date of the judgment in that case. Therefore, we are not able to say that the judgment was void, unless proved so by other evidence. It may be that in that instance, as was also the case in *Weimmer v. Sutherland* and *Simon v. Justice's Court*, the order made by the justice attempting to set aside his judgment was based upon evidence other than the docket and other than the papers on file. This, it was held, he could not do. It clearly appears that such attempted judicial action is beyond the power of the justice, even though it be admitted that possibly he has the right to make an order canceling his entry of a judgment where the judgment is void upon its face. We do not believe that the decision in *Newman v. Barnet*, 165 Cal. 423, [132 Pac. 588], was intended to affirm the jurisdiction of a justice of the peace to receive evidence and determine facts after judgment, upon a question of this kind.

Turning now to the order of July 18, 1914, which is under review in this action, and to the grounds of the motion upon which that order was based, we find that the judgment did not appear to be void for any of the reasons named in the notice of motion. The return to the summons showed that a copy of the complaint was served upon the defendant. The summons did have upon it the name of the plaintiff's attorney, and the return showed that the constable had served a copy thereof. The third reason stated was that service of the summons was not had upon defendant and return made within three years from the commencement of the action. This was true and so appeared on the face of the



record, but the fact was not sufficient to deprive the justice of jurisdiction. (*Hubbard v. Superior Court*, 9 Cal. App. 166, [98 Pac. 394]; *Pistolesi v. Superior Court*, 26 Cal. App. 403, [147 Pac. 104].)

But the appellant claims that the judgment was void, and that this fact so appears from a mere inspection of the record thereof, because the attempted service of summons upon him was made in Imperial County, and it does not affirmatively appear that when served he was a resident of that county, nor that at the time of commencement of the action he was a resident of Los Angeles County. Section 848 of the Code of Civil Procedure, relating to actions in justices' courts, states that "the summons cannot be served out of the county wherein the action is brought, except in the following cases: . . . 2. When the action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides; . . . 4. In all cases where the defendant was a resident of the county when the action was brought, or when the obligation was incurred, and thereafter departed therefrom, in which event he may be served wherever he may be found; . . . " Section 832 of the Code of Civil Procedure provides that the township in which the obligation is incurred is deemed to be the township in which it is to be performed, unless there is a special contract in writing to the contrary.

The complaint in *Roberts v. Francis* alleged that in the said Los Angeles township the defendant entered into a contract with plaintiff's assignor, which contract was set forth and is in the form of a written order for certain merchandise and is signed by the defendant. The complaint further alleged that said obligation was incurred and made payable at Los Angeles township, county and state aforesaid. These allegations were sufficient to bring the case within the terms of the above quoted subdivision 2 of section 848, and authorized service of the summons to be made upon the defendant in the county of his residence, even if he resided elsewhere than the county of Los Angeles. It is not pretended that in fact the defendant did not reside in the county of Imperial when the summons was served upon him. On this point it is merely claimed that the judgment is "void upon its face," because there is no affirmative statement in the

judgment or in the return of summons that the defendant resided in that county. But we think that if he did in fact reside in that county, the court obtained personal jurisdiction over him for the purposes of that case. In *History Co. v. Light*, 97 Cal. 56, [31 Pac. 627], it was held that a defendant has the right to move to set aside the service of a summons attempted to be made in violation of the above-mentioned provisions of section 848, and that the motion is properly made upon affidavits showing the grounds of the motion, and that the justice has jurisdiction to hear and decide such motion. But the court also said: "The burden of proving the improper service is, of course, upon the defendant in such a motion, and he should be required to present a clear case." If this was the rule of evidence upon a motion of that kind before judgment, it seems incontestable that upon a motion to set aside a judgment rendered upon a like record of service of process, the defendant must assume the same burden of showing that he was not a resident of the county where he was served. If this be true, then the judgment in *Roberts v. Francis* was not void upon its face, and any effort on the part of the justice to hear and act upon a motion to set aside such judgment would be an attempt to act judicially in a matter wherein his jurisdiction had been exhausted.

That the portion of the order of the justice's court which attempted to dismiss the action was beyond its jurisdiction, follows from our conclusion that it was without power to set aside the judgment.

The order of the superior court is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1724. First Appellate District.—February 28, 1916.]

C. T. SPADER, Appellant, v. JAMES ROLPH, Jr., Mayor of the City and County of San Francisco, Respondent.

SAN FRANCISCO CHARTER—MISCONDUCT OF FIRE COMMISSIONERS—REMOVAL OF CHIEF ENGINEER WITHOUT TRIAL—REMOVAL OF BOARD BY MAYOR.—Under the provisions of section 2 of chapter 2 of article IX of the charter of the city and county of San Francisco, which declares that no officer, member, or employee of the fire department should be removed from office except for cause and after trial, the board of fire commissioners have no right to remove the chief engineer of the department without assigning a cause therefor and without trial, and where they do so after being so advised by the city attorney, and after being notified to desist by the mayor, their action affords sufficient ground for their removal from office.

ID.—VOID PROVISION OF CHARTER—EFFECT OF CONSTITUTIONAL AMENDMENT.—While, at the time of the adoption of the charter of the city and county of San Francisco in the year 1900, the provision of section 2 of chapter 2 of article IX thereof was void by reason of its conflict with section 16 of article XX of the constitution, such void provision was effectively validated by the amendment of November 3, 1914, to section 8½ of article XI of the constitution, giving municipal corporations governed by charters the authority to provide for the tenure of office and removal of municipal employees, and no change in such charter provision or re-enactment was necessary in order to give it effect.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Keogh & Olds, H. I. Stafford, and John T. Thornton, for Appellant.

Percy V. Long, City Attorney, and George Lull, Assistant City Attorney, for Respondent.

KERRIGAN, J.—The plaintiff applied to the superior court praying that a writ of review be issued directed to the defendant, as mayor of the city and county of San Francisco, requiring him to certify to said court a transcript of the proceedings had in a certain hearing and trial by said

defendant of the members of the board of fire commissioners of said city and county (of which the plaintiff was one), as the result of which trial an order was made by the defendant dismissing the members of said board from office. The prayer of the petition is further that said order be annulled and adjudged void.

An order to show cause being thereupon issued, the defendant demurred to the petition. The demurrer was sustained, with leave to the plaintiff to amend; and upon his failure so to do, a judgment was entered in favor of the defendant and for costs. The plaintiff appeals.

The controversy arises out of the fact that the board of fire commissioners removed one Thomas R. Murphy from his position as chief engineer of the department without assigning a cause therefor and without trial. This fact appeared in the petition for the writ, and it is the contention of the appellant in support of his appeal that the board in so removing Murphy acted in conformity with the provisions of the charter of the city and county, and that consequently the removal by the defendant of the board of fire commissioners—based as it was upon their action in thus discharging Murphy—was wrongful.

The San Francisco charter as adopted in 1900 provided in effect that no officer, member, or employee of the fire department should be removed from office except for cause and after trial, and in this respect the charter has remained unchanged. The removal of Murphy took place in December, 1914.

The petitioner claims that as a matter of law the board was justified in its action in not according to the removed member of the fire department a hearing or trial, inasmuch as the charter fixes no term of office for the chief engineer of the department, and that therefore its provisions limiting the right of the board to remove or dismiss such officer "except for cause" and only "after trial" were void at the time of its adoption, by reason of their conflict with section 16 of article XX of the constitution, the terms of which we give below.

It is also claimed in support of the appeal that even if the petitioner, as a member of the board of fire commissioners, did violate the charter in the respect mentioned, such action

was no more than an honest mistake, and therefore furnished no sufficient ground for his removal.

At the time of the adoption of the charter in the year 1900, section 16 of article XX of the constitution just referred to read as follows: "When the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years."

Section 2 of chapter II of article IX of the charter provides: "No officer, member or employee of the department shall be dismissed or transferred except for cause, nor until after a trial. The accused shall be furnished with a written copy of the charges against him at least three days previous to the day of the trial. He shall have the right to appear in person and by counsel and examine witnesses in his behalf. All witnesses shall be examined under oath, and all trials shall be public."

It thus clearly appears that at the time of the adoption of the charter, the provision thereof just quoted was in violation of section 16 of article XX of the constitution, and therefore void, and that the term of office of the chief engineer not being fixed by law, he held the office at the pleasure of the appointing power, to wit, the board of fire commissioners. (*Sponogle v. Curnow*, 136 Cal. 580, [69 Pac. 255]; *Wall v. Board of Directors*, 145 Cal. 469, [78 Pac. 951].)

But in November, 1906, and subsequent to the time when the cases just cited were decided, and prior to the removal of Murphy, section 16 of article XX of the constitution was amended by the addition of the following provision: "In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control."

This amendment was enacted not long after the decision in the case of *Coffey v. Superior Court*, 147 Cal. 525, [82 Pac. 75], where it was held that the provisions of the municipal charter of the city of Sacramento were not such as to show an intention to confer upon the city trustees exclusive jurisdiction to remove the chief of police, and that the

superior court, under section 758 of the Penal Code, had concurrent jurisdiction in that matter. And no doubt, as was said in the cases of *Dinan v. Superior Court*, 6 Cal. App. 217, 221, [91 Pac. 806], and *Craig v. Superior Court*, 157 Cal. 482, [108 Pac. 310], this amendment was in line with the policy of the state and the tendency of the late decisions and constitutional amendments to broaden the authority of municipal corporations, governed by charters, to prescribe their own rules and regulations in purely municipal affairs. There can be no serious question that the object of the amendment of 1906 to section 16 of article XX of the constitution was to make it clear that the provisions of a freeholders' charter should control in the matter of the dismissal from office of any officer or employee of a municipality. (*Craig v. Superior Court*, 157 Cal. 482, [108 Pac. 310].) In other words, as counsel for the defendant says: "The constitution itself exempts municipal officers from the provisions of the section so far as tenure of office or dismissal from office are concerned."

But the amendment to the constitution above set out was made after the enactment of the San Francisco charter containing the requirement of preferment of charges and trial of a municipal employee before discharge; and it is contended that its effect must be limited to charters thereafter enacted, and that it could not vivify a void statutory provision already in existence.

However that may be, we think there can be no doubt that this previously invalid provision of the San Francisco charter was effectively validated and given force and effect by a further amendment to the state constitution adopted on November 3, 1914, viz., an amendment to section 8½ of article XI, which took effect before the action of the board of fire commissioners in dismissing Murphy. Subdivision 4 of that amendment reads, in part, as follows: "It shall be competent in any charter framed in accordance with the provisions of this section, or section eight of this article, for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such



city or city and county, excepting judges of the superior court, shall be elected or appointed, and for their recall and removal and for their compensation and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. *All provisions of any charter of any such city or consolidated city and county, heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid.*"

Under this amendment to the constitution no change in section 2 of chapter II of article IX of the San Francisco charter, or re-enactment thereof, was necessary in order to make it valid and constitutional.

Nor does this amendment mean, as claimed by appellant, that only such provisions of the charter as were in accordance with the constitution are confirmed and declared valid. One of its plain purposes was to exempt from the possible operation of section 16 of article XX of the constitution the matters of the tenure of office, appointment, and dismissal of municipal employees. The amendment so declares in express terms. The concluding sentence of the amendment above set out, and which we have italicized, is too plain to admit of any other construction. The words, "in accordance herewith," contained in said concluding sentence, grammatically and logically refer not to the constitution as a whole, but to section 8½ thereof, the particular section to which the amendment relates.

The case of *Banas v. Smith*, 133 Cal. 102, [65 Pac. 309], is not in conflict with the conclusion we have arrived at in this case. When the facts in that case arose there had been no amendment to the constitution by which the invalid provisions of the charter of Los Angeles were confirmed and declared valid.

From these considerations we conclude that by virtue of the last mentioned amendment to the constitution, irrespective of amendments previously adopted, the provisions of the charter of San Francisco as found in section 2 of chapter II of article IX, relating to the right of an officer, member, or employee of the fire department to a trial upon charges before dismissal from the department, are valid and in full force and effect.



Turning, now, to the second point relied upon by the appellant, it appears that the members of the board of fire commissioners, after being advised by the city attorney that they had no power to do so, and after they had been notified by the mayor that they must desist, nevertheless proceeded to and did, without preferring charges and without a trial, remove the chief engineer of the department from office. This constituted a deliberate and arbitrary violation of an express provision of the charter in a matter of grave importance, and undoubtedly afforded a sufficient ground for the exercise by the defendant of his power to remove after trial all the members of the board.

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 27, 1916.

[Civ. No. 1733. First Appellate District.—February 23, 1916.]

PEARL M. McINTOSH et al., Respondents, v. CLARENCE M. HUNT, Appellant.

TRUST—CONVEYANCE OF REAL PROPERTY BY WIFE TO HUSBAND—NATURE OF CONTEMPORANEOUS ORAL UNDERSTANDING—LIFE ESTATE—SUFFICIENCY OF EVIDENCE.—In this action to have a trust declared in certain real estate conveyed to the defendant by his wife a short time before her death, it is held that notwithstanding the sharp and irreconcilable conflict in the statements of the respective parties as to the nature of the contemporaneous oral agreement, there is sufficient evidence to support the findings to the effect that the title of the defendant was to be in the nature of a life estate, with right to the income of the property, with the fee in remainder to the plaintiffs at his death.

ID.—EVIDENCE—LETTER—INSUFFICIENT RECORD ON APPEAL.—In such an action alleged error in refusing the admission in evidence of a letter written by the defendant to the husband of one of the plaintiffs in reply to a letter written by the latter explaining the nature and effect of the escrow arrangement in question, cannot be considered, where the record contains no copy of the excluded letter.



APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Wm. M. Cannon, for Appellant.

Powell & Dow, P. E. Keeler, and C. H. McIntosh, for Respondents.

RICHARDS, J.—This is an appeal from a judgment in plaintiffs' favor in an action brought by them against the defendant, their father, to have a trust declared in respect to certain real estate conveyed by their mother to him a short time before her death.

The principal contention of the appellant is that the evidence is insufficient to sustain the findings and judgment of the trial court. The record is voluminous, but there are certain facts of vital importance to the determination of this issue concerning which there is no dispute, and which may be briefly set forth as follows: The defendant Clarence M. Hunt and his wife were married about thirty-seven years before the latter's death. Their life together had been happy, congenial, and mutually confidential during the whole of this period, and no differences or quarrels of any kind had ever arisen between them. Two children had been born of this marriage—the plaintiffs herein; and these had grown up in the home of their parents, and had in due time married and established themselves in homes of their own, the plaintiff Pearl M. having wedded C. H. McIntosh, a lawyer residing and practicing his profession in the state of Nevada, and the plaintiff Reuben H. having elected the profession of physician, with his residence and practice in San Francisco. During the earlier years of his married life the defendant Clarence M. Hunt had been engaged in various occupations, working generally upon a salary, and had been enabled thereby not only to support his family comfortably, but to give to each of his two children the benefit of an excellent education, including for his daughter a course in the University of California, and for his son a degree from a local medical college. He had also laid aside some property of his

own. A few years before the death of his wife, Hattie G. Hunt, which occurred in 1910, she received the sum of thirty-one thousand dollars as an inheritance from her parents' estate, which money was turned over to her husband for investment, and which was invested by him in several pieces of real estate in San Francisco and in Alameda County, the deeds to which being in each instance taken in the name of his wife. About this time the defendant gave up his other occupations, and thereafter devoted himself to the management of these investments and of his own properties. He attended to all of the details of purchasing his wife's property, arranging for the mortgages and insurance which were to be placed and carried thereon, caring for and renting the property, collecting the rents, and paying the interest and other charges. The income from the property of his wife and of himself was commingled in a common fund, from which the expenses of the family were taken, and from which also each received such money as either required, no account being ever had between them. In the summer of 1909 a small lump was found to be growing upon the breast of the wife which occasioned some family alarm, but which did not seem to affect her general health, nor operate to interfere with her intention of taking a trip north to visit the Seattle Exposition. On the eighth day of July, 1909, just before she started upon said trip, she made, executed, and delivered to the defendant, her husband, three deeds, absolute in form, with an expressed consideration in each of \$10, to the several pieces of real estate theretofore standing in her name and involved in this litigation. These deeds were acknowledged and delivered before and in the presence of Addie L. Ballou, a notary public of the city and county of San Francisco, who was a witness in the case and who testified that no conversation relating to the creation of a trust or other limitation upon these conveyances occurred in her presence between the parties at the time of the delivery of the deeds. These deeds were retained by the defendant until some time in the month of November, 1910, when they were presented for record in the respective counties where the property was located. A few days after their recordation the insurance policies upon these properties were transferred from the name of Hattie G. Hunt to that of Clarence M. Hunt, his wife signing the necessary papers for such transfer in the form of which it

was recited, "ownership of the property herein insured having actually passed to Clarence M. Hunt, for value received I hereby transfer and assign to him all my title and interest in this policy." In the meantime the lump which had been observed on the breast of Mrs. Hunt continued to grow until it was at length diagnosed as cancer, and two operations were undertaken for its removal. These proved unavailing, and after the second operation in August, 1910, she had failed rapidly until it became apparent that she was soon to die. In the month of December, 1910, the members of her family were collected at her home in anticipation of her near dissolution. On the twenty-second day of December they were all gathered in her room, the defendant and the trained nurse also being present, at which time the dying woman was engaged in distributing among them such trinkets and personal effects as she wished each to have.

Up to this point there is no disagreement as to the facts of the case; but from this moment forward the testimony of the plaintiffs and the defendant is in sharp and irreconcilable conflict. According to the testimony of the plaintiffs, of C. H. McIntosh, of Mrs. R. H. Hunt, and of Luella Walden, the trained nurse, the following statement of the conversation and conduct of the respective parties present may be fairly collated: After the gifts of her personal effects and property as above stated, Mrs. Hunt, speaking to her son-in-law and to the defendant, and referring to the real estate in question, said, "I have deeded this property to Clarence, but with the understanding that he is to have a life income and that the property was to go to the children. I have always trusted 'Gorrie' [her pet name for her husband], but people change, and he may change or may get married again. That property belongs to me; it is my own property, came to me from my father. It was understood that it was to go to the children, and that Gorrie was to have the use and income of it during his lifetime to provide himself with what he needed and make himself comfortable; but people, as I say, change; he may get married again. I do not want any mistakes as to the understanding that was had between us with reference to the ownership of this property. I do not want some outside person, some stranger whom he might marry, to be in a position to claim or obtain any part of my property that it was intended and agreed belonged to my children. I want this

in writing [speaking to her husband]—not that I don't trust you, but you might change." Mr. Hunt replied, "Yes, Mamma"; and then he and McIntosh retired from the room into the hallway, where, according to the latter, the following conversation occurred: "I said to him, 'Well, Gorrie, how is this thing to be arranged?' 'Well,' he said, 'I don't know just how it had best be fixed up.' 'Well,' I said, 'Gorrie, I can tell Mother—she is waiting for some disposition of it—I can tell her that you have executed a declaration of trust, and then the matter can be fixed up in that way later.' He said 'All right; tell her that, and we will fix it up later.'"

They then returned to the bedroom, when, according to Mr. McIntosh, Mrs. Hunt said, "Well, what is to be done? I want you to fix it, Bertie, now, and in writing, so there can't be any misunderstanding or mistake." "'Well,' I said, 'Mother, Gorrie has executed a declaration of trust in favor of the children covering this property.' She turned her head on the pillow toward Mr. Hunt and said, 'Clarence, is that true?' and he said, 'Yes, Mamma, that is correct. Everything will be all right.'"

This ended the matter for the time being. Mrs. Hunt died a few days later. During the month of January, 1911, as Mr. McIntosh relates, the subject was revived in conversation between himself and Mr. Hunt, in which the former said, "It can either be done by a declaration of trust or by a trust deed, or by deed delivered in escrow with an agreement for the delivery of the instrument to the grantees upon your death," to which Mr. Hunt replied, "I believe I would prefer the escrow deeds"; and it was then agreed that Mr. Hunt was to get the data for the deeds and send it to Mr. McIntosh at Tonopah, who was to draw the papers and send them to Mr. Hunt for execution.

To practically all of the foregoing evidence with respect to what occurred at the bedside of his wife, with his son-in-law, and again later in the month of January, Mr. Hunt made a positive and categorical denial when upon the witness-stand; but his testimony in that regard stands practically alone as against the statements of all the other members of the family who were present and of the trained nurse.

The record further shows that on January 18, 1911, Mr. Hunt wrote an affectionate letter to his son-in-law, then in Nevada, inclosing documents from which the latter could get

descriptions of the property, and directing him to make out escrow deeds in favor of his son and daughter, which he stated he would sign and acknowledge and would have placed in escrow. In response to this letter he presently received from Mr. McIntosh drafts of several deeds, each covering a separate piece of the property in question, in which he was named as the grantor and his son and daughter as the grantees. He acknowledged receipt of these deeds by letter dated January 23, 1911, in which he asked several questions as to the manner and form of their execution, but made no objection to their granting clauses. In connection with these deeds, and either at the time of their transmission or a few days later, Mr. McIntosh had also forwarded to Mr. Hunt the draft of an escrow agreement, setting forth specifically, among other things, that, "Whereas the undersigned Clarence M. Hunt accepted, took and holds title to said lands and premises above described for the benefit of said Reuben H. Hunt and said Pearl M. McIntosh jointly pursuant to and in virtue of an agreement between said Clarence M. Hunt and the late Hattie G. Hunt, his wife, the consideration of which agreement was that the undersigned Clarence M. Hunt should during his lifetime have and receive for his own sole uses, benefits and disposal all and singular the net rents and income of and from all of said lands and premises—Now therefore it is provided that the undersigned Clarence M. Hunt shall have and receive . . . the free and unrestricted use and enjoyment of all of said premises and property as to the rents and income thereof and therefrom for his own uses, purposes and benefits during his life-time," and in which also an unnamed escrow trustee is directed to deliver the aforesaid deeds to the plaintiffs as the grantees thereof upon the death of Clarence M. Hunt. On February 1, 1911, Mr. McIntosh replied to the letter of the defendant of January 23d, explaining at considerable length the nature and effect of the execution and delivery of deeds in escrow. To this letter the defendant wrote a reply, which was not received in evidence and which will be dealt with later. The whole matter seems to have rested at this point for a period of several months, although the defendant testifies that from the time of the receipt of the letter of Mr. McIntosh of February 1, 1911, explaining the nature and effect of an escrow deed, he had

resolved not to sign the deeds. During the summer of 1911 Mr. Hunt's intention to marry again came to the attention of his children and resulted in an increasing discord, during which the discussion of his intent to carry into effect the alleged understanding with his wife and children in regard to the property was renewed, and during which he definitely refused to make any disposition of the property which would hamper in any way his control over it. After several vain efforts to adjust the matter the present action was brought.

From the foregoing *résumé* of the evidence in the case we are of the opinion that, notwithstanding the sharp and irreconcilable conflict in the statements of the respective parties, and notwithstanding that the defendant—the only living witness to the agreement, if any, between himself and his wife contemporaneously with the execution and delivery of the deeds from herself to him—swore positively that there was no understanding or agreement between them at the time these deeds were made, or at any other time, that they were to be other than absolute conveyances of the property, to him, we think there is sufficient evidence presented by the plaintiffs, if accepted by the court, to support its findings and judgment to the effect that such a contemporaneous understanding existed between the defendant and his wife that his title to the property was to be in the nature of a life estate with the right to its income, with the fee in remainder to his children at his death.

The appellant urges that the finding of the court that it was the *net* income only which the defendant was to enjoy is unsupported by any evidence; but we think that the finding is fairly deducible from the record, and particularly from the terms of the escrow agreement prepared at the defendant's direction, and also from the proofs of the way in which the income of the property had been disposed of both before and after the defendant received the title to it from his wife.

The appellant further insists that the court committed an error of law in its refusal to permit the defendant to put in evidence the letter which the defendant had written and sent to Mr. McIntosh about February 1, 1911, upon the receipt by him of the letter from Mr. McIntosh explaining the nature and effect of the escrow arrangement. In making this con-

tention the appellant relies mainly upon the language of section 1854 of the Code of Civil Procedure, which reads as follows: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence." The appellant urges that under this section of the Code of Civil Procedure he was entitled to have this letter of his own admitted in evidence, both because it was a part of a series of conversations and negotiations between the parties, and because it was an answer to a letter of Mr. McIntosh, who was apparently acting on behalf of the plaintiffs in seeking to consummate the escrow arrangement.

The difficulty with the question thus presented lies not so much with the law regarding it, as it does in the fact that the record before us contains no copy of the letter which the appellant claims was thus wrongly excluded; and we are therefore unable to determine whether the letter in question was in any true sense such an answer to the letter of Mr. McIntosh as would entitle it to admission, or whether it had any reference or relevancy whatever either to the subject matter of the McIntosh letter, or to the pending negotiations between the parties; and we are, therefore, unable to say that the trial court, which had the contents of the letter before it, was in error in refusing it admission in evidence.

The appellant further contends that the court was in error in refusing to permit the defendant to testify as to the conversations occurring between himself and his wife at the time of the execution of the deeds to him. No authority is cited to support the appellant's contention in this regard; and we think the inhibition contained in section 1881 of the Code of Civil Procedure respecting communications between husband and wife covers exactly the case in hand, and furnishes a full justification for the ruling of the court in the exclusion of this evidence.

No other grounds of alleged error being urged by the appellant, the judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 29, 1916, and the following opinion then rendered thereon:

THE COURT.—The petition for a rehearing is denied. The only matter contained in the court's decision which might require correction is the statement therein that the defendant at the time of the bedside conversation answered, "Yes, Mamma," to his wife's statement of the agreement between them at the time of the execution of the deeds in question. The record does not show that this reply of the defendant was given at that time, but in our opinion a reading of the entire record shows the assent of the defendant to the correctness of his wife's assertion, as to the oral understanding attending the execution of the deeds. There is sufficient evidence upon this point to justify the trial court, hearing and seeing the witnesses before it, in the conclusion that the proof was clear and convincing as to the existence of the contemporaneous oral understanding upon which the plaintiffs rely.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 27, 1916, and the following opinion then rendered thereon:

THE COURT.—The application for a hearing in this court after decision by the district court of appeal of the first district is denied.

In denying the application we deem it proper to say that we are not prepared to give our assent to that portion of the opinion which substantially holds that the trial court did not err in refusing to allow the defendant to answer certain questions addressed to him as to what was said to him by his wife at and prior to the execution of the deeds to him. An examination of the record discloses that the object of defendant in this regard was substantially accomplished by his being permitted, over plaintiff's objections, to give testimony as to the same subject matter. In view of the testimony thus given the error, if any, cannot be held to have been prejudicial.

[Civ. No. 1711. Second Appellate District.—February 23, 1916.]

E. WILSON, Respondent, v. R. P. SHEA et al., Defendants; C. E. COOPER et al., Appellants.

CONTRACT—BENEFIT OF THIRD PARTY—ENFORCEMENT.—In order to sustain an action for the enforcement of a contract made for the benefit of a third person there must have been an intent clearly manifested on the part of the contracting parties to make the obligation inure to the benefit of the third party, or, as declared in section 1559 of the Civil Code, the contract must be one "made expressly for the benefit of a third person."

ID.—INCIDENTAL BENEFIT.—When two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other.

ID.—PURCHASE OF CONTRACT RIGHTS IN REAL PROPERTY—GUARANTY CONTRACT—ADDENDUM—ENFORCEMENT BY PURCHASER.—A purchaser of contract rights in certain real property, who was given a guaranty contract signed alone by the original owner of such rights guaranteeing the securing of a good title to the property, has no right of action, against certain other persons, who were to share the commissions on the sale, and who, at the request of the signer of the guaranty, after its execution and delivery to the purchaser, signed an addendum to a copy thereof, which recited that the responsibility of the guaranty was shared by the signers with the original guarantor in proportion to the amount of the commission on the sale which each received, where it is made to appear that such purchaser did not rely upon such addendum clause and had no knowledge of its existence until several months after the purchase.

ID.—ACTION ON CONTRACT—APPEAL BY SIGNERS OF ADDENDUM CONTRACT—SERVICE OF NOTICE—ORIGINAL GUARANTOR NOT AN ADVERSE PARTY.—In an action brought by the purchaser against the original guarantor and signers of the addendum contract, wherein judgment was rendered for the full amount of the guaranty against the former and against the latter in such proportions as the amounts of their commissions bore to the whole amount of the guaranty, it is not necessary upon the taking of an appeal from the judgment by the signers of the addendum contract, that the original guarantor be served with notice of the appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

O'Melveny, Stevens & Millikin, Walter K. Tuller, and Alex Macdonald, for Appellants.

George E. Cryer, for Respondent.

JAMES, J.—Appeal taken by defendants C. E. Cooper and Robert Marsh from a judgment entered against them, and from an order denying their motion for a new trial.

At a time anterior to the commencement of this action defendant R. P. Shea held contract rights in certain real property located in the city of Los Angeles. He exchanged these rights with one Vance for an automobile. At a later date Vance desired to dispose of the interest thus acquired in the real estate. Shea and Cooper at that time were both employed with Robert Marsh & Co., realty brokers. Under their contract of employment commissions earned on property sold were divided as follows: Shea, ten per cent; Cooper, fifty per cent; Robert Marsh, forty per cent. Vance being a friend of Shea's and having purchased the contract rights in the lots from the latter, submitted to the firm mentioned his proposition to rid himself of his interest in the real estate. A purchaser was found in the person of one Mrs. Looney, the assignor of the plaintiff. The agent who represented Mrs. Looney, realizing that there might be a question regarding the title which it was possible to obtain under the contracts, insisted that a guaranty contract be given, which contract was furnished by defendant Shea. This contract guaranteed that a good title would be secured within one year, in default of which Shea agreed in writing that upon notice of the fact being furnished him, he would pay to Mrs. Looney the sum of \$1,318, and take back an assignment of Mrs. Looney's interest in the lots. There was a commission paid on the deal amounting to the sum of \$560, which came into the hands of Robert Marsh & Co., to be divided among Shea, Cooper, and Marsh in the proportions hereinbefore mentioned. This commission was so divided. Some time after the execution and delivery of the guaranty contract signed by Shea, a copy thereof was presented to Cooper and Marsh. Shea had added a postscript to which he secured the signatures of Cooper and Marsh, which postscript was worded as follows: "It is hereby agreed that the responsibility of this guarantee

is shared by Robert Marsh & Co. and C. E. Cooper with R. P. Shea, said responsibility being prorated in accordance with commission paid." This addendum was not made upon the original guaranty; in fact was not contemplated to be made at all by Mrs. Looney, and was not of any influence in furthering the deal as made with her. Mrs. Looney's agent testified with reference to the closing of the transaction as follows: "In order to close this deal, I required Mr. Shea to give the written guaranty introduced in evidence here. I was satisfied to take the written guaranty of R. P. Shea solely and individually, and I did so, and I closed the deal upon that understanding." This witness testified that it was several months after the closing of the transaction that he learned of the making of the addendum. However, at the end of the year Mrs. Looney was unable to secure good title to the lots purchased from Vance, and this suit was brought by her assignee against Shea on the guaranty, Cooper and Marsh being joined by reason of the alleged liability which accrued against them under the "postscript" contract. The trial judge entered judgment for the full amount of the guaranty, to wit, \$1,318, against Shea, and against the appellants Cooper and Marsh in such proportions of the total amount of the guaranty as the amounts of commission paid to them bore to such whole amount. No appeal was taken on the part of defendant Shea. The appellants here, Cooper and Marsh, contend that no right of action existed in favor of Mrs. Looney or her assignee, as against them under the addendum contract, for the reason that they at no time contracted any liability in favor of Mrs. Looney. The judgment as against these appellants, if sustained, must be sustained wholly by reason of the provisions of section 1559 of the Civil Code. That section provides as follows: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." This section is but an expression of the rule established by the majority decisions of the courts of the United States, permitting an action to be brought against a person by a party in whose benefit such person may have contracted with another. The rule of the decisions is clear to the point that in order to sustain such an action there must have been an intent clearly manifested on the part of the contracting parties to make the obligation inure to the benefit of the third party.

As our code declares, the contract must be one "made *expressly* for the benefit of a third person. . . ." A right in the third party to enforce a contract which may be of incidental benefit to him has never been admitted. Some of the decisions have gone so far as to declare that such third party must be the one solely and exclusively benefited by the contract. (See 3 Page on Contracts, sec. 1312, and cases cited thereunder.) Our own supreme court in the case of *Chung Kee v. Davidson*, 73 Cal. 522, [15 Pac. 100], has adopted the rule of the New York decisions, and said: "When two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other." On the face of the writing which was signed by Cooper and Marsh it is not made to appear that the intent of these appellants was to assume responsibility to Mrs. Looney on account of the guaranty, but rather that their contract was one of a kind of indemnity given for the protection of Shea. If there is any doubt which a court might be left in respecting that matter, it would be one, we apprehend, which should be resolved against any right in the plaintiff to sue these appellants. Attention has already been called to the fact, not disputed in evidence, that Mrs. Looney did not rely upon the guaranty of these appellants, and that she had no knowledge of the existence of the contract until months had elapsed after the closing of her deal. Shea, it appears, desired to be protected and insisted upon the addendum being made, not for Mrs. Looney's benefit, but for his own security. His testimony to the effect that in his oral conversations with Cooper and Marsh they arrived at the agreement to share the liability in the proportions as the commissions were to the total amount mentioned in the main contract, does not militate at all against the views which we have expressed as to the rights of Mrs. Looney or her assignee in the matter. The testimony offered on the part of the appellants, even upon that question, was directly in contradiction of Shea's assertion, the appellants insisting that their agreement was only to return to Shea the amount of the commission received by them, in the event that he was compelled to make good on his guaranty with Mrs. Looney. In view of the fact that Shea had been

the original owner of the contract rights in the lots and that he was the person who sold them to Vance and received a consideration in that transaction, it would seem quite natural that Shea would have the largest interest in the transaction on account of his possible liability to Vance by reason of failure of title to the real estate. However, upon this branch of the case, a conflict of evidence precludes us from taking issue with the determination made by the trial judge.

It was not necessary that Shea be served with notice of the appeal taken in this action. Plaintiff has a judgment for the full amount of her claim against Shea, and this judgment will not be disturbed by granting a new trial as to these appellants. Defendant Shea, therefore, is not such an adverse party as to require service to be made upon him in order to effectuate the appeal. (*Robson v. Superior Court*, 171 Cal. 588, [154 Pac. 8].)

For the reasons first given, the judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 23, 1916.

MEMORANDUM CASE.

[Civ. No. 1933. Second Appellate District.—December 31, 1915.]

BAKERSFIELD & KERN ELECTRIC RAILWAY COMPANY (a Corporation), Petitioner, v. **GEORGE W. HAY et al.**, Respondents.

REFERENDUM PETITION—ELECTION—CITY OF BAKERSFIELD.—Writ of mandate denied on the authority of *Bakersfield & Kern Electric Ry. Co. v. Hay*, ante, p. 289.

APPLICATION for a writ of mandate.

The facts are similar to those stated in the opinion in *Bakersfield & Kern Electric Ry. Co. v. Hay*, ante, p. 289.

Short & Sutherland, and **Borton & Theile**, for Petitioner.

E. F. Brittan, and **Walter Osborn**, for Respondents.

THE COURT.—In response to an alternative writ issued herein, the respondents have filed a general demurrer. The facts are the same and the questions presented for decision are the same as in *Bakersfield & Kern Electric Ry. Co. v. Hay* (Civil No. 1934), ante, p. 289 [155 Pac. 132], petition for writ of prohibition, in which decision has been filed this day. For the reasons stated in the opinion filed in that case the demurrer is sustained and the application for peremptory writ of mandate herein is denied.

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ABANDONMENT. See Criminal Law, 14, 15.

ABATEMENT. See Corporations, 5.

ACCOMPLICE. See Criminal Law, 24, 122.

ACCOUNT.

ACCOUNT — ASSUMPTION BY ANOTHER — INSUFFICIENCY OF EVIDENCE TO SHOW.—In an action to recover on an account for goods sold to a third party, it being contended that the defendant assumed the obligation, the evidence is insufficient to sustain a finding in favor of the plaintiff, where it consisted solely of a letter written by the secretary of the company to the plaintiff, stating in substance that defendant would be glad to settle its general account with plaintiff, after the allowance of a certain credit, and, referring to the particular account sued on, saying that the difficulty with it was in the agency agreement between plaintiff and the original debtor, out of which the account grew, but that defendant was attending to the obligations of the latter company and expected to take care of this one, the letter indicating, however, some controversy between the parties and a difference of understanding regarding the agency contract. (*Guernsey v. Johnson Organ and Piano Mfg. Co.*, 699.)

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ADVERSE POSSESSION.

1. **VOID DEED FROM HUSBAND TO WIFE.**—The rule that a married woman not living separate and apart from her husband and having no claim in her own right to land cannot acquire title to it as her separate estate by adverse possession, is applicable to a case where the wife claims separate ownership under a void deed from the husband. (*Wills v. E. K. Wood L. & M. Co.*, 97.)
2. **RIGHT OF WAY — ADVERSE USER — CONTINUOUS USE.**—While a right of way may be acquired by adverse possession, where it is so asserted the party claiming it must prove its continuous and uninterrupted use. (*Lapique v. Morrison*, 136.)
3. **TITLE OF UNITED STATES AND STATE UNAFFECTED BY.**—Title by adverse possession cannot be asserted as against the ownership of the United States or of the state in lands which have not been patented. (*Id.*)
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ADVERSE POSSESSION (Continued).

water lots of the city and county of San Francisco cannot be acquired by holders of alcalde deeds and their successors in interest, as against the purchasers of the reversionary interests of the state therein, as the possession of such holders and that of their successors is under the state grant of the leasehold interest. (*Potrero Nueve Land Co. v. All Persons*, 743.)

AFFIDAVIT OF MERITS. See Place of Trial, 7.**AGENCY.****CONTRACT—AGENCY FOR SALE OF GRAIN BAGS—RECOVERY OF COMMISSIONS—PERFORMANCE OF AGREEMENTS—SUFFICIENCY OF EVIDENCE.—**

In this action to recover certain commissions alleged by the plaintiff to be due him from the defendant under certain oral contracts, by which the latter agreed to constitute the former its agent for the sale of grain bags, it is held that the trial court did not abuse its discretion in setting aside its decision in favor of the plaintiff and granting the defendant a new trial, in view of the infirmities of the proof and of the entire evidence as to whether the plaintiff had sufficiently performed his part of the agreements as to keeping the defendant informed as to the conditions and doings of the market in grain bags, and to furnish defendant with confidential information, which plaintiff was not to furnish other persons in the same line of business, and to inform defendant of the prices at which bags were offered and quoted to plaintiff in order to give the defendant the first opportunity to sell and to give said defendant the preference in all sales. (*Mills v. George A. Moore & Co.*, 405.)

See Broker; Fraud, 7-9; Mechanics' Liens; Negligence, 18, 19.

ALTERATION OF INSTRUMENTS. See Place of Trial, 5-8.**AMENDMENT. See Pleading, 5, 6.****APPEAL.**

1. **ACTION UPON UNDERTAKING ON APPEAL—STAY OF EXECUTION OF ORDER APPOINTING RECEIVER—AFFIRMANCE OF ORDER—RES ADJUDICATA.**—In an action brought against the sureties upon an undertaking given to stay the execution of an order appointing a receiver pending an appeal therefrom, the affirmance of the order on appeal is *res adjudicata* as to the authority of the court to appoint the receiver. (*Borges v. Hillman*, 144.)
2. **PLEADING—PROPER PARTY PLAINTIFF.**—The plaintiff in the main action, and not the receiver, is the proper party to maintain the action upon the undertaking. (*Id.*)
3. **TIME OF COMMENCEMENT OF ACTION.**—An action upon such an undertaking is prematurely brought where at the time of its commencement the judgment in the main action has not become final

APPEAL (Continued).

by reason of the fact that the time to appeal therefrom has not expired. (Id.)

4. **RECOVERY UPON UNDERTAKING—COSTS ON APPEAL.**—The fact that in such an action the plaintiff seeks relief for only the damage alleged to have been suffered by him from the moneys which came into the hands of the defendant in the main action pending the appeal from the order appointing the receiver, does not prevent him from maintaining an action in the proper forum upon the undertaking, in so far as it obligates the sureties to reimburse him for the costs on the appeal from the order appointing the receiver. (Id.)
5. **CONSTRUCTION OF UNDERTAKING.**—The provision in such an undertaking, so far as it relates to the possession of the land involved and the collection of the rents, issues and profits thereof by the defendant, pending the decision on the appeal from the order appointing a receiver, "that if the said appellant does not make such payment within thirty days after the filing of the *remittitur* from the supreme court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties for the *said amount of said judgment*, together with interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal," means, in the absence of any pending appeal the disallowance of which by the appellate court would result in a judgment for any amount of money, that the sureties would not only guarantee the payment of the costs on the appeal from the order, but that, if a final judgment on the merits was eventually obtained by the plaintiff, they would indemnify him against any damage which might result to him by reason of the fact that, pending the determination of the appeal from the order, the defendant was permitted to remain in possession of the property and to collect and retain the rent thereof. (Id.)
6. **ORDER DISMISSING ACTION AS TO CERTAIN DEFENDANTS—DISMISSAL OF APPEAL.**—An appeal from a judgment dismissing an amended complaint in intervention as to certain defendants, but leaving the question undetermined as to other defendants, should be dismissed, as the order of dismissal is not a final judgment and determination of the action. (*Dabney Oil Co. v. Providence Oil Co. of Arizona*, 251.)
7. **FAILURE TO FILE BRIEF—DISMISSAL.**—Where the respondent on an appeal neither files his brief nor appears at the oral argument, although served with a notice that appellant would move for a reversal of the order appealed from without consideration of the cause upon its merits, upon this ground, the order appealed from will be reversed. (*Bullock v. Bullock*, 463.)
8. **UNDERTAKING ON APPEAL—STAY OF EXECUTION—LIABILITY OF SURETY.**—The liability of a surety on an undertaking on appeal

APPEAL (Continued).

given to stay the execution of a judgment for the return of specific personal property, or its value, and for a certain sum of money, is not extinguished, in so far as the money judgment is concerned, by the turning over to the appellant upon affirmance of the judgment of all property belonging to appellant in respondent's hands, including an amount in cash in excess of the amount of such money judgment, where it is shown that some of the property was disposed of by respondent pending the proceedings, and that upon applying the money upon the demands held by the appellant there still remained a balance due upon the judgment. (*Hammond v. United States Fidelity & Guaranty Co.*, 464.)

9. **AMOUNT OF UNDERTAKING—AGREEMENT OF PARTIES.**—An undertaking on appeal from a judgment for the delivery of personal property, or its value, and for a fixed amount of money is not void, because of the fact that the amount of such undertaking was fixed by the parties, instead of by the court, as the surety is bound by the statement in its contract, and cannot question the truth of such recitals. (*Id.*)
10. **ESTOPPEL OF SURETIES.**—When the party in whose favor the undertaking was executed has had the benefit of a stay of execution, the surety cannot be heard to say that the undertaking was void because all the forms of the statute, through its omission, were not complied with. (*Id.*)
11. **UNLAWFUL DETAINER—LACK OF ERROR.**—It is held on the appeal in this case that the appellant having filed a brief in which not a single question of law or ground of alleged error is presented, and the court having examined the record and finding no error, the judgment and order appealed from should be affirmed. (*Brissolara v. Sbrana*, 471.)
12. **CONSTITUTIONAL LAW—REVIEW OF EVIDENCE IN CIVIL CASES.**—The recent amendment to section 4½ of article VI of the constitution, whereby appellate courts, in civil cases, are authorized, for certain indicated purposes, to examine "the entire cause, including the evidence," etc., does not contemplate the review of the evidence with a view of determining where the preponderance lies, but that the evidence may be reviewed only for the purpose of determining whether the court may be required to hold that from any error in the misdirection of the jury, or in the admission or rejection of evidence, or as to any matter of pleading or procedure, a miscarriage of justice has resulted. (*Snyder v. Miller*, 566.)
13. **RECORD ON—AFFIDAVITS.**—Affidavits, although contained in the printed transcript, which are not in any manner authenticated as a part of the record on appeal, cannot be considered by the appellate court. (*Crofford v. Crofford*, 662.)
14. **ORDER DENYING NEW TRIAL—DISMISSAL—AMENDMENT OF 1915 TO SECTION 963, CODE OF CIVIL PROCEDURE.**—Under the amendment of 1915 to section 963 of the Code of Civil Procedure, which took

APPEAL (Continued).

away the right theretofore existing in a party to appeal from an order refusing a new trial, an appeal from such an order taken after the amendment became effective must be dismissed, although the proceedings for a new trial were instituted prior thereto. (Hester v. McMullan, 664.)

15. **CONSTRUCTION OF SECTION 939, CODE OF CIVIL PROCEDURE—AMENDMENT OF 1915.**—Section 939 of the Code of Civil Procedure, as amended in 1915, does not enlarge the right of a party to appeal in cases other than those specified in section 963 of the Code of Civil Procedure. (Id.)
16. **MOTION TO DISMISS—SUFFICIENCY OF NOTICE OF APPEAL—RULE OF CONSTRUCTION.**—A liberal rule of construction must be applied to notices of appeal in order to effectuate the rights of the parties to an appeal. (Hopkins v. Sanderson, 666.)
17. **SUFFICIENCY OF NOTICE—FAILURE TO NAME ALL DEFENDANTS.**—In an action against five defendants composing a board of trustees of a high school district, an appeal from the judgment will not be dismissed upon the alleged insufficiency of the notice of appeal which in the title merely describes the defendants as "Charles L. Sanderson et al., Defendants" (without naming each defendant), but in the body of the notice states "that the defendants above named desire to appeal and do hereby appeal . . . from the whole of that certain order . . . and from the whole of the judgment of the aforesaid Superior Court, etc." (Id.)
18. **ORDER DISMISSING MOTION FOR A NEW TRIAL—INSUFFICIENT RECORD—CONFLICTING EVIDENCE.**—On an appeal from an order dismissing a motion for a new trial on the ground of lack of prosecution, where there is no properly authenticated record on appeal, and especially where the record shows that the order appealed from was made after a hearing in which the evidence presented by parties was conflicting, the action of the lower court will not be disturbed. (Healy v. Obear, 696.)
19. **APPEAL FROM JUDGMENT—MATTERS REVIEWABLE.**—Where an appeal from a judgment is not taken within sixty days from its entry, the appellate court is confined to examination of the judgment-roll alone. (Id.)
20. **BRIEFS—CONSTRUCTION OF SECTIONS 953A, 953B, 953C, CODE OF CIVIL PROCEDURE.**—On an appeal from a judgment, where the record is presented as provided by sections 953a, 953b, and 953c of the Code of Civil Procedure, under the latter section, in filing briefs on appeal, the parties must print in the briefs, or in a supplement appended thereto, such portions of the record as they may desire to call to the attention of the court. (Robertson v. Ballou, 711.)
21. **APPEAL BY ONE PARTY—UNDERTAKING ON APPEAL ON BEHALF OF SEVERAL PARTIES—LACK OF LIABILITY.**—Where an appeal is taken

APPEAL (Continued).

by one person and the undertaking thereon purports on its face to be given on an appeal taken by several persons, such undertaking is insufficient to support the appeal, and no recovery can be had against the sureties. (*Fry v. Astorg*, 740.)

See Costs; Criminal Law, 8, 9, 40, 121; Divorce, 12; Judgment, 6; Justice's Court, 1-6; Negligence, 10, 11; New Trial, 7; Practice, 1; Promissory Note, 8, 6; Receiver, 1.

ASSAULT. See Criminal Law, 35-41.

ASSIGNMENT.

1. **BUILDING CONTRACT—ABANDONMENT—ASSIGNMENT BY CONTRACTOR OF MONEY TO BECOME DUE—CONSTRUCTION OF INSTRUMENT.**—An assignment by a contractor engaged in the construction of a school building of a specified sum of money "out of the twenty-five per cent of said contract price to be paid to me under said contract after the completion and acceptance of the building," operates solely upon the fund to become due and payable only upon the completion of the building, and not upon moneys becoming due and payable as the work progresses; and where the contractor abandons the contract before completion, the school trustees are not liable to the assignee for the amount of the assignment, under their indorsement on the contract recognizing the assignment and reciting an agreement to pay the sum named "out of the payment" to be made "at the time of completion and acceptance of said building." (*Lynip v. Alturas School District*, 158.)

2. **GUARANTY OF PAYMENT TO ASSIGNEE—ABANDONMENT OF WORK—DISCHARGE OF GUARANTORS.**—The execution by the school trustees, in addition to such indorsement, of a guaranty that the specified sum of money should be repaid to the assignee upon the completion of the school building "out of the twenty-five per cent of the contract price of said building held back until the completion of said building," does not make them guarantors of the original obligation, and upon the abandonment of the contract by the contractor their liability became extinguished. (*Id.*)

See Promissory Note, 10.

ATTACHMENT. See Garnishment.

ATTORNEY AT LAW.

1. **PROCEEDING TO DISBAR ATTORNEY—CONVICTION OF FELONY—PARDON.**

In a proceeding to disbar an attorney upon the sole ground of his previous conviction of a felony, an objection that the conviction was subsequently annulled and set aside by a pardon issued by the governor of the state for the offense set forth in the judgment of conviction should be sustained. (*Matter of Emmons*, 121.)

ATTORNEY AT LAW (Continued).

2. **PARDON—EFFECT OF—GROUNDS FOR DISBARMENT.**—A pardon releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense; but this is subject to the limitation that an attorney may be disbarred for acts of a felonious nature, where a pardon has followed the conviction of a crime, since evidence of the criminal acts may constitute proof of the charge that the respondent is unfit to be an attorney at law. This is so for the reason that the pardon does not restore his good moral character. (*Id.*)
3. **CONTRACT—SERVICES OF ATTORNEY—SUFFICIENCY OF EVIDENCE.**—In this action to recover for attorney's fees it is held that the findings support the judgment of the trial court as to the services rendered after defendant's incorporation and as to their value. (*Kierski v. Lick Co.*, 480.)

See Practice, 3-5.

BAIL.

ACTION TO RECOVER BAIL MONEY—COUNTERCLAIM—CONFLICTING EVIDENCE.—In an action to recover certain bail money, where the defendant attempts to offset the value of certain services, and the evidence is conflicting, the decision of the trial court will not be disturbed on appeal. (*Gilbert v. Odom*, 481.)

BAKERSFIELD, CITY OF. See Election, 3-6.

BANK.

1. **BANKING LAW—WITHDRAWAL OF SAVINGS BANK DEPOSITS BY PUBLIC ADMINISTRATORS—CONSTRUCTION OF STATUTE.**—The act of 1909, as amended in 1911 (*Stats.* 1909, p. 87; *Stats.* 1911, p. 1007), providing that the public administrator, upon an order countersigned by a judge of the superior court, may withdraw, without notice, money of a decedent where the same may be required for the purposes of administration, "or otherwise," creates a special right which must be complied with upon the part of the bank, with the condition that a compliance with those provisions of the statute will not impose upon the bank a liability against which it is not provided to be indemnified. (*Bryson v. Security Trust & Savings Bank*, 596.)
2. **LOSS OF PASS-BOOK OF DECEASED DEPOSITOR—CONDITIONS OF DEPOSIT—COMPLIANCE NOT ESSENTIAL.**—Where the pass-book of a deceased depositor has been lost and never been regularly transferred by the depositor, the bank cannot insist upon compliance with the printed conditions in the book as to publication of notice of loss and the furnishing of indemnity, as a condition to the payment of the deposit to the public administrator. (*Id.*)
3. **PASS-BOOK—WITHDRAWALS OF MONEY—PROHIBITION OF BOOK—NON-NEGOTIABLE INSTRUMENT.**—A pass-book of a savings bank de-

BANK (Continued).

positor is a non-negotiable instrument, where it is recited in the printed conditions stated therein that the book should be presented with every deposit made and check drawn, as such condition contemplates an order signed by the depositor separate from the delivery of the book. (Id.)

4. **CONTRACT—AGREEMENT TO FORM PARTNERSHIP—DEPOSIT OF MONEY BY ONE PARTY IN BANK—FAILURE TO FORM PARTNERSHIP—RIGHT TO RECOVER DEPOSIT.**—Where two parties agree to form a partnership for conducting a certain business under a firm name, and it being agreed that each should deposit with a certain bank to the credit of the firm a certain sum, and in pursuance of the agreement one of the parties deposited his amount, but the other party failed to make any deposit, and the partnership was never consummated, and after three years nothing was done toward that end, the depositor of the money is entitled to recover from the bank the money so deposited by him, and while the other party technically should be made a party to the suit, section 4½ of article VI of the constitution should be applied, and the suit should not be defeated because he is not. (*Hulbert v. All Night and Day Bank*, 765.)
5. **DEPOSIT IN BANK—RIGHT OF OWNER TO SHOW TITLE.**—While it is true that a bank receiving a deposit of money may not, in the absence of proper legal proceedings to impound it, dispute the depositor's ownership thereof, or refuse to honor his checks drawn thereon, nevertheless the real and true owner thereof may show his right to the funds. (Id.)

BANKRUPTCY.

1. **BANKRUPTCY — JUDGMENT LIEN—WHEN PRESERVED.**—The lien of a judgment as a preferential lien in favor of a creditor of a bankrupt is dissolved when the petition in bankruptcy is filed within four months of the obtaining of the judgment, but may be preserved for the benefit of all the creditors in a case where the dissolution of such lien would militate against the best interests of the estate of the bankrupt. (*Wills v. E. K. Wood L. & M. Co.*, 97.)
2. **DISCHARGE IN BANKRUPTCY—LIENS NOT AFFECTED BY.**—A discharge in bankruptcy releases from personal liability only, and has no effect upon liens against the property of the bankrupt. (Id.)

BEACH AND WATER LOTS. See Adverse Possession, 4; Partition.

BILL OF EXCEPTIONS. See New Trial, 1, 2.

BONA FIDE PURCHASER.

1. **EVIDENCE—TITLE UNDER UNRECORDED DEED—CLAIM UNDER SUBSEQUENTLY RECORDED DEEDS — BONA FIDE PURCHASE — BURDEN OF**

BONA FIDE PURCHASER (Continued).

PROOF.—Where one holding under an unrecorded deed brings an action involving the respective titles to the land against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without the knowledge of the rights of the previous grantee. (*Purcell v. Victor Power & M. Co.*, 504.)

2. **RULE WHEN INAPPLICABLE.**—Such rule, however, is inapplicable to the plaintiff in an action to quiet title to a portion of a lode mining claim, where the deed under which the defendant relied was not made known until after the plaintiff rested his case. (*Id.*)

BOUNDARY.

CITY LOTS—SUFFICIENCY OF EVIDENCE.—In this action in ejectment and for damages for the unlawful detention of land, which involved the location of the boundary line between two lots in the city of Sacramento, upon the dividing line of which a fence had existed for probably forty years, or more, it is held that in view of the meager character of the evidence of the real boundary line as located and fixed by the original survey of the city (*Sutter survey of 1848 or 1849*), and in accordance with which the deeds of the parties were made, and of the existence of the fence, and of the inclusion of the disputed strip in the inclosure of the defendant, the court was justified in finding that the plaintiffs had failed to establish any title to the property in controversy. (*Perich v. Maurer*, 293.)

See Criminal Law, 66-70.

BROKER.

1. **CONTRACT—OPTION TO SELL REAL PROPERTY—SALE BY OWNER AFTER EXPIRATION — RECOVERY OF COMMISSIONS.**—Under an option to sell real estate which expressly limits the life thereof to a period of ninety days from its date, a provision therein that in the event that the owner should sell the property to anyone to whom the property had been recommended by the brokers within ninety days after the expiration of the option, he would pay them a commission of five per cent on the gross amount for which he might so sell the property, contemplates that such commission should be payable only in the event that a sale was thus made to a party to whom the brokers had recommended the property while the option agreement was still in force; and where a sale is thus made to a party recommended by them after the expiration of the ninety day period, they are not entitled to the commission. (*Elsa v. Fassler*, 187.)
2. **CONTRACTS—SALE OF REAL ESTATE—BROKER'S COMMISSION.**—A contract authorizing real estate brokers to sell property which makes the brokers the exclusive agents for the sale of the property but does

BROKER (Continued).

not clothe them with the exclusive right to sell the property, does not entitle the brokers to a commission on a sale made by the owner unaided by the agents. (*Snook v. Page*, 246.)

3. **RATIFICATION—SALE BY OWNER.**—The sale by the owner does not constitute a ratification within the meaning of a contract providing that the owner shall be liable for commission on any sale made by the agents, "or ratified" by the owner during the life of the agreement. (*Id.*)
4. **DEFINITION OF "RATIFICATION."**—The terms "adopt" and "ratify" are properly applicable only to contracts by a party acting or assuming to act for another. (*Id.*)
5. **REAL ESTATE BROKERS—DIVISION OF COMMISSIONS—UNEQUAL PROPORTIONS—STATUTE OF FRAUDS.**—An oral agreement between real estate brokers to divide commissions on sales of real estate in unequal proportions is not within the statute of frauds. (*Hellings v. Wright*, 649.)
6. **ACTION TO RECOVER COMMISSIONS—PLEADING—COMPLIANCE WITH AGREEMENT—SUFFICIENCY OF COMPLAINT.**—In an action brought to recover commissions due under such an oral agreement, the omission to allege in the complaint that the plaintiff "obtained agreements from purchasers to pay the balance in monthly installments," etc., which was part of the sale plan, does not destroy the sufficiency of the complaint, as against a general demurrer, where it is alleged that sales were made under such plan, and that monthly payments were made by the purchasers. (*Id.*)

See Contract, 5; Statute of Frauds, 1-5.

BUILDING CONTRACT. See Assignment; Specific Performance.

CHECK. See Criminal Law, 50-54; Garnishment; Sale, 15-18.

CLAIM AND DELIVERY.

1. **PLEADING—VALUE OF PROPERTY.**—A complaint in an action to recover the possession of mortgaged personal property, which contains no allegation showing the value of the demanded property other than that contained in a copy of the mortgage attached to the complaint, which purports to give the value of some of the mortgaged articles, is insufficient, as an allegation of value at the time of filing the complaint. (*Keiser v. Levering*, 41.)
2. **RECITALS IN CONTRACT—INSUFFICIENT PLEADING.**—Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. (*Id.*)
3. **JUDGMENT FOR VALUE OF PROPERTY—EXCESS OF INDEBTEDNESS.**—In such an action a judgment for the possession of all the mortgaged property or for its value in case delivery thereof cannot be had is

CLAIM AND DELIVERY (Continued).

excessive, where the indebtedness for security of which the property was mortgaged does not amount to one-half of such value. (Id.)

4. **JUDGMENT—ALTERNATIVE FORM.**—In an action to recover the possession of personal property, while the judgment must ordinarily be in the alternative, yet a judgment that is not in that form is not void, and whether or not it is even erroneous must depend upon the facts of the particular case. (Id.)
5. **JUDGMENT FOR RETURN OF PROPERTY—TENDER—UNJUSTIFIED REFUSAL TO ACCEPT.**—In an action in claim and delivery to recover possession of an automobile, where judgment was rendered in favor of the defendant for the recovery of the property, or the amount found to be its value if return could not be had, the defendant was not justified in refusing to accept a return of the property four months after the entry of judgment, upon the sole ground of its depreciation in value merely by lapse of time, and under the circumstances she cannot maintain an action to recover the value of the automobile upon an undertaking given in the original action to procure delivery of the property to the plaintiff therein. (*Martin v. United States Fidelity & Guaranty Co.*, 499.)

COMMUNITY PROPERTY. See Deed, 3.

CONSIDERATION. See Promissory Note, 1-3, 11-15; Specific Performance, 4.

CONSTITUTIONAL LAW. See Appeal, 12; Eminent Domain, 1, 4; Insane Persons, 4, 5; Negligence, 8; Office and Officers, 1, 7, 8; Street Assessment, 1.

CONTRACT.

1. **ARCHITECT'S SERVICES—DRAWING OF PLANS—SUFFICIENCY OF EVIDENCE.**—In an action to recover for services of an architect in drawing plans for a house, where the plaintiff testified that the preparation of the plans and the making of changes thereafter were at the request of the defendant, but the testimony was radically conflicting as to what the agreement was between the parties, the decision of the trial court in favor of the plaintiff will be upheld on appeal. (*Salfield v. Cohn*, 417.)
2. **COVERING METAL DOORS—SUFFICIENCY OF EVIDENCE.**—In this action to recover for services in covering with leather metal doors, the judgment of the lower court is affirmed upon the sole question as to whether certain instructions were given to the company performing the services. (*Mayers v. San Francisco Cornice Co.*, 485.)
3. **EMPLOYMENT TO PICK FRUIT—DISCHARGE OF EMPLOYEES—REMEDY.**—In an action by an employee to recover for breach of an

CONTRACT (Continued).

agreement by his employer in which the former was employed to pick fruit, where the court found upon sufficient evidence that the employee was discharged by the defendant and prevented from completing his contract without sufficient cause, the former was entitled to sue for the agreed price of the fruit actually cared for according to the terms of the contract, and was not compelled to sue in *quantum meruit* for the reasonable value of the services performed. (Johns v. Sanfilippo, 494.)

4. FINDINGS—INCONSISTENCY OF—LACK OF INJURY.—In such a case a finding that the plaintiff's assignors "neglected to furnish a sufficient number of pickers and cutters to pick, harvest, and cut said grapes, and neglected to pick said fruit as directed by defendant," if inconsistent with the finding that the defendant was not damaged by this neglect in any sum whatever, does not injure the defendant, where the evidence is fairly in conflict as to any injury which the defendant sustained by reason of said neglect, the conflict having been resolved in favor of the plaintiff, and for that reason not to be disturbed on appeal. (Id.)
5. BROKER'S COMMISSION—MANNER OF PAYMENT—CONSTRUCTION.—Where a written contract, employing a real estate broker to effect an exchange of properties, provided for payment of a certain sum to the broker, and from the record it appears that after the negotiations for the exchange of properties were completed the defendant informed the broker that he would have to wait until a crop of potatoes belonging to him was harvested, which was agreed upon, and the parties then entered into a written addition to the agreement providing that when the crop was sold "the proceeds to the amount of \$1,650 is to be turned over to me in liquidation of above indebtedness," the quoted language of the contract was merely a limitation upon the amount of money to be paid to the broker from the proceeds of the crop, and where the crop sold for less than the amount of the broker's commission, the latter was entitled to recover the difference from the defendant. (Evans v. Hindes, 708.)
6. BENEFIT OF THIRD PARTY—ENFORCEMENT.—In order to sustain an action for the enforcement of a contract made for the benefit of a third person there must have been an intent clearly manifested on the part of the contracting parties to make the obligation inure to the benefit of the third party, or, as declared in section 1559 of the Civil Code, the contract must be one "made expressly for the benefit of a third person." (Wilson v. Shea, 788.)
7. INCIDENTAL BENEFIT.—When two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other. (Id.)

CONTRACT (Continued).

- 8. PURCHASE OF CONTRACT RIGHTS IN REAL PROPERTY—GUARANTY CONTRACT—ADDENDUM—ENFORCEMENT BY PURCHASER.**—A purchaser of contract rights in certain real property, who was given a guaranty contract signed alone by the original owner of such rights guaranteeing the securing of a good title to the property, has no right of action, against certain other persons, who were to share the commissions on the sale, and who, at the request of the signer of the guaranty, after its execution and delivery to the purchaser, signed an addendum to a copy thereof, which recited that the responsibility of the guaranty was shared by the signers with the original guarantor in proportion to the amount of the commission on the sale which each received, where it is made to appear that such purchaser did not rely upon such addendum clause and had no knowledge of its existence until several months after the purchase. (Id.)
- 9. ACTION ON CONTRACT—APPEAL BY SIGNERS OF ADDENDUM CONTRACT—SERVICE OF NOTICE—ORIGINAL GUARANTOR NOT AN ADVERSE PARTY.**—In an action brought by the purchaser against the original guarantor and signers of the addendum contract, wherein judgment was rendered for the full amount of the guaranty against the former and against the latter in such proportions as the amounts of their commissions bore to the whole amount of the guaranty, it is not necessary upon the taking of an appeal from the judgment by the signers of the addendum contract, that the original guarantor be served with notice of the appeal. (Id.)

See Broker; Building Contract; Dairy; Novation; Sale; Statute of Frauds.

CORPORATION.

- 1. CORPORATION LAW—STOCKHOLDERS' LIABILITY—STATUTE OF LIMITATIONS.**—An action to enforce the liability of stockholders of a corporation is, under the provisions of section 359 of the Code of Civil Procedure, an action to enforce "a liability created by law," and is barred at the expiration of three years from the time when the liability was created, and not at the expiration of such period from the discovery of the facts creating such liability. (Johnson v. Hinkel, 78.)
- 2. BREACH OF LEASE—LIABILITY OF STOCKHOLDERS—TIME OF CREATION—STATUTE OF LIMITATIONS.**—In an action to recover damages upon a stockholder's liability for breach of the terms of a lease of land made by the corporation, the statute of limitations runs from the time of breach, and not from the time of the execution of the lease. (Id.)
- 3. JURISDICTION OF SUPERIOR COURT.**—The superior court has no jurisdiction as to defendants in an action upon a stockholders' liability

CORPORATION (Continued).

where the prayer for damages against them is for less than three hundred dollars. (Id.)

4. **CORPORATION LAW—STOCKHOLDER'S LIABILITY—NATURE OF.**—The liability of a stockholder of a corporation for its obligations is, by the terms of section 322 of the Civil Code, a primary and statutory liability, which is in no wise affected by actions against the corporation to recover upon its contractual obligations. (*Union Trust Co. of San Francisco v. Journeay*, 502.)
5. **ACTION AGAINST STOCKHOLDERS—PLEA IN ABATEMENT—PENDENCY OF ACTIONS AGAINST CORPORATION AND AGAINST STOCKHOLDERS ON GUARANTY.**—A plea of former actions pending, to be successful, must be based upon actions between the same parties and upon the same cause of action; and such a plea cannot be successfully made in an action against stockholders of a corporation upon their statutory liability, where it is based upon a former action against the corporation itself and an action against some of the stockholders on a guaranty of indebtedness of the corporation executed by them. (Id.)
6. **PLEADING—USE OF MONEY FOR BENEFIT OF DEFENDANT CORPORATION—SUFFICIENCY OF COMPLAINT.**—Where it appears from the allegations of the complaint that the transaction was between two corporations in their corporate capacity, and that the plaintiff advanced the money to the defendant, which was the "value received" by the latter for executing the note, the complaint is not subject to demurrer on the ground that it does not state that any money received in exchange for the note was used for the benefit of the defendant corporation. (*Union Trust Co. of San Francisco v. Ensign-Baker B. Co.*, 641.)
7. **AUTHORITY TO EXECUTE CORPORATION NOTE—PRESUMPTION.**—The complaint is not subject to demurrer for failure to allege that the president and secretary of the corporation maker were duly authorized to execute the note, as such authority will be presumed. (Id.)
8. **DESIGNATION OF CORPORATE CAPACITY—ABBREVIATIONS.**—The use of the abbreviations "Pres." and "Secy." in designating the official capacities in which the president and secretary of the corporation maker signed the note, is sufficient to show official capacity. (Id.)
9. **CORPORATION LAW—AUTHORITY OF SECRETARY.**—The secretary of a corporation has no inherent power to assume any obligation on behalf of the corporation, or agree without any consideration whatsoever to bind the corporation to pay the debt of another. (*Guernsey v. Johnson Organ & P. Mfg. Co.*, 699.)

See *Fraud*, 1, 7-9; *Judge*, 2-4; *Mutual Benefit Association; Receiver*, 2-4.

COSTS.

1. **BRIEFS ON APPEAL—CONSTRUCTION OF SECTION 1027, CODE OF CIVIL PROCEDURE.**—Under the amendment of 1913 to section 1027 of the

COSTS (Continued).

Code of Civil Procedure, a party is entitled to recover his costs in printing a reply brief on appeal, not exceeding \$50, although the brief was filed before the amendment to that section, which then did not provide for such costs, where the judgment did not become final upon appeal until after the passage of the amendment. (Cain v. French, 725.)

2. **MODIFICATION OF STATUTE.**—Costs are but an incident of a judgment, and the rule pertaining to the allowance of costs in an action may be changed or modified by statute during its pendency. (Id.)

See Appeal, 4; Eminent Domain, 1; Sale, 7; Water and Water Rights, 2.

COUNTERCLAIM. See Pleading, 7-10.**COUNTY.**

1. **COUNTIES — LIABILITY FOR CLAIMS — MEASURE OF AUTHORITY OF TRIBUNAL.**—The statute only must be looked to, to ascertain the extent of the authority of any tribunal to determine and fix the liability of a county for any claims that may be presented against it. (White v. Mathews, 634.)
2. **EXPERTING OF COUNTY BOOKS—PAYMENT FOR SERVICES—CONSTRUCTION OF SECTION 928, PENAL CODE—SUPERIOR COURT WITHOUT JURISDICTION.**—The superior court has no power, under section 928 of the Penal Code, to issue an order directing a county auditor to draw his warrant in payment of the services of an expert employed by the grand jury to examine the books of the officers of the county, as its jurisdiction under such section is limited to the approval of the employment of the expert, and *mandamus* will not lie to compel the issuance of such a warrant. (Id.)
3. **APPROVAL OF CLAIM—DUTY OF BOARD OF SUPERVISORS.**—A claim for services for experting county books must be settled and allowed, as other claims, by the board of supervisors, as the only power of the grand jury is to enter into an agreement for the employment at an agreed compensation *per diem*, and the only power of the court is to approve such employment. (Id.)

See Criminal Law, 67-70; Office and Officers.

COURTS. See Justice's Court; Superior Court.**CRIMINAL LAW.**

1. **EXAMINATION OF TALESMEN—PEREMPTORY CHALLENGE.**—The limitation of examination of jurors on their *voir dire* for the purpose of exercising a peremptory challenge is very completely within the discretion of the judge, and defendant is not entitled to embark in a general exploration for the sole purpose of satisfying himself

CRIMINAL LAW (Continued).

- whether it would be safe to try the case before a juror against whom no legal objection can be urged. (*People v. Ecton*, 478.)
2. **CROSS-EXAMINATION—LIMITATION OF.**—Refusal to allow defendant's counsel to cross-examine a witness with respect to his testimony at the preliminary examination in a murder case, which affected only the form of the questions and did not deny the right to ask appropriate questions showing contradictions and inconsistencies, is not erroneous. (*Id.*)
3. **ARGUMENT—READING NEWSPAPERS.**—In such a case refusal of the court to allow the reading in argument of extracts from newspapers is not erroneous where the record fails to show what the offered extracts were, or what relation, if any, they might have had to the subject matter of the case. (*Id.*)
4. **AMENDMENT OF INFORMATION AFTER PLEA—CONFORMANCE TO COMMITMENT—STATEMENT OF LESSER OFFENSE—LACK OF PREJUDICE.**—In a criminal action it is not prejudicial to the substantial rights of the defendant to allow the district attorney, after the defendant has entered his plea of not guilty to the information, to amend the information to make it conform to the commitment by the magistrate, where the crime charged under the amendment is included within the crime charged in the original information. (*People v. Chober*, 627.)
5. **AMENDMENT OF INFORMATION AFTER PLEA—MOTION TO SET ASIDE UNAUTHORIZED.**—A new or amended information cannot be set aside on the ground that an information cannot be amended at any time after the defendant has pleaded thereto, as such ground is not among those enumerated in section 995 of the Penal Code, which expressly prescribes and limits the grounds of such a motion. (*Id.*)
6. **VERDICT UPON CONFLICTING EVIDENCE—RULE.**—If the evidence which bears against a defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone the appellate court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive. (*Id.*)
7. **INSTRUCTIONS—SELF-DEFENSE.**—It is not error to refuse to give to the jury a number of instructions proposed by the defendant containing a statement of the law of self-defense, where the court gave in substance and effect all that was contained in such proposed instructions. (*Id.*)
8. **APPEALS FROM JUSTICE'S COURT—CONSTRUCTION OF SECTION 1466, PENAL CODE.**—The provisions of section 1466 of the Penal Code, that the parties may appeal from justices' judgments "in like cases and for like cause as appeals may be taken to the supreme court," does not make applicable all of the provisions respecting the pre-

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paration of the record to be used on appeal as the same are outlined in title IX of said code. (Matter of Howell, 668.)

9. **GIVING NOTICE OF APPEAL AND FILING BOND—LOSS OF JURISDICTION BY JUSTICE.**—The filing of a notice of appeal from a judgment of the justice's court and furnishing the required bail in the amount fixed by the justice, after conviction on a misdemeanor charge, ousts the justice of jurisdiction to proceed further, and removes the cause to the superior court, notwithstanding the appellant does not prepare his statement on appeal within the time prescribed by law; and the justice has no power, until the superior court dismisses the appeal, to issue an order attempting to release the bail and commit the defendant to the custody of the sheriff. (Id.)
10. **IMPRISONMENT IN STATE'S PRISON—EFFECT ON CIVIL RIGHTS.**—Under section 673 of the Penal Code, a sentence of imprisonment in a state prison for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment. (Castera v. Superior Court, 694.)
11. **RIGHT TO SUE CONVICT.**—Even where conviction of a felony results in civil death (as it does in this state upon a sentence of imprisonment for life), the weight of authority is apparently in harmony with the English doctrine to the effect that the convict still remains subject to be sued. (Id.)
12. **IMPRISONMENT OF PLAINTIFF IN PENITENTIARY—RIGHT OF DEFENDANT TO PROCEED—MANDAMUS.**—Notwithstanding the imprisonment of the plaintiff in a civil action in the state prison, upon the conviction of a felony, after the filing by him of a complaint in the civil action, the defendant in the action has the right to have the action proceed, and upon the court's refusal to proceed with the case, mandamus will issue to compel it. (Id.)
13. **CONDITIONAL COMMUTATION OF SENTENCE—POWER OF GOVERNOR.**—The constitution makes no distinction between the power of the Governor to grant pardons and to commute sentences, and in either case he has the power to attach such conditions as he may think proper, and the condition that a commutation shall be void if the party thereafter be convicted of a felony is valid. (Matter of Wilson, 702.)
14. **ABANDONMENT OF WIFE—CONSTRUCTION OF SECTION 270A, PENAL CODE.**—Under section 270a of the Penal Code a husband is not guilty of the crime of abandonment and failure to support his wife where the evidence does not show that he had the ability so to do. (People v. Turner, 193.)
15. **EVIDENCE—CONDUCT SUBSEQUENT TO DATE OF CHARGE.**—While the prosecution in such a charge is bound to prove that the offense was committed on or about the date alleged, evidence of the defendant's

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- subsequent conduct, and the question whether or not he secured employment and was able to support his wife, is admissible to show his intent when he left her on the date charged. (Id.)
16. **ADULTERY—ESSENTIALS.**—In order to warrant a conviction of the offense denounced in section 269b of the Penal Code, cohabitation alone is not sufficient, but there must be an assumption of the conjugal relations, such as sleeping together, occupying the same room or bed at night, having sexual intercourse with each other as though married, and many other relations that are summed up appropriately by the words "cohabiting with." (People v. Woodson, 531.)
17. **PARENTAGE OF CHILD—RELEVANCY OF EVIDENCE.**—In a prosecution for such an offense evidence is admissible that the defendant was the father of a child born to his companion in crime while they were living together as husband and wife, where it is shown that the woman was not cohabiting with her husband. (Id.)
18. **PARENT AND CHILD—REBUTTAL OF PRESUMPTION OF LEGITIMACY.**—The presumption that a child born of a married woman is legitimate may be rebutted by evidence showing that the husband was incompetent, entirely absent, so as to have no intercourse or communication of any kind with the mother, entirely absent at the period during which the child must, in the course of nature, have been begotten, or only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. (Id.)
19. **CONDUCT OF DEFENDANT—INTRODUCTION OF COMPANION AS WIFE.**—In such a prosecution there is no error in admitting evidence showing defendant's attitude and conduct when he heard his companion introduced as his purported wife. (Id.)
20. **CAUSE OF WIFE LEAVING HOME—EXCLUSION OF PROOF.**—In such a prosecution there is no error in excluding evidence that the companion of the defendant left her home by reason of the brutal treatment of her husband. (Id.)
21. **CHARACTER WITNESS—EXPLANATION OF ANSWER—LACK OF PREJUDICE.**—In such a prosecution there is no error in permitting a witness as to the general reputation of the defendant to supplement his answer with the explanation that he had known the defendant for three or four years, and had seen him often, and in the last two or three years had not seen him. (Id.)
22. **CONDUCT OF PARTIES—STRIKING OUT OF ANSWER—LACK OF PREJUDICE.**—There is no error in striking out the answer of the mother of the woman to the question as to whether she observed any improper conduct on the part of either the defendant or her daughter while visiting them, where such answer was in part not responsive, and the responsive part subsequently given in answer to another question. (Id.)

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23. **TIME OF OFFENSE—INSTRUCTION—LACK OF ERROR.**—An instruction to the jury to find the defendant guilty if he lived in cohabitation and adultery "any time from about the month of November, 1912, up to the twenty-seventh day of April, 1915," is not erroneous, notwithstanding the charge in the information that the offense was committed "on or about the twenty-third day of April, 1915." (Id.)
24. **DATE OF OFFENSE—AVERMENT IN INDICTMENT.**—It is unnecessary to charge in the indictment the precise date upon which an offense was committed, or to prove the offense to have been committed on the day charged, except where time is of the essence of the offense. (Id.)
25. **CONVICTION OF DEFENDANT—EVIDENCE TO BE CONSIDERED—INSTRUCTION—ABSENCE OF ERROR.**—An instruction that "if the jury believed to a moral certainty and beyond a reasonable doubt that the said defendant did"—reciting the averments of the information—"then I charge you it will be your duty to bring in a verdict of guilty as charged," is not erroneous, for the reason that it did not confine the jury to the evidence, where the court also instructed the jury that they had no right to go outside of the evidence, but that they must fairly consider all the evidence in the case. (Id.)
26. **DESTRUCTION OF INSURED PROPERTY—SUFFICIENCY OF INDICTMENT—NAME OF OWNER OF PROPERTY AND BENEFICIARY OF INSURANCE IM-MATERIAL.**—In a prosecution for the crime defined by section 548 of the Penal Code, that is, of willfully burning insured property with intent to defraud the insurer, it is not necessary to allege in the indictment the name of the person to whom the property belonged, or who was the beneficiary of the insurance, the essential facts being that the property was insured against loss, and that the defendant burned or otherwise destroyed the property with intent to defraud or prejudice the insurer. (*People v. Barbera*, 604.)
27. **SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.**—The contention that the evidence was insufficient to show any intent on the part of the defendant to defraud the insurance company, based on the claim that testimony of certain witnesses for the state was unworthy of belief, rather than on any claim that there was no evidence tending to prove such criminal intent, cannot be maintained on appeal, as the question was one for the jury. (Id.)
28. **EVIDENCE—PHOTOGRAPHS OF BUILDING AFTER FIRE.**—There was no error in admitting in evidence certain photographs taken a few hours after the fire, showing the burnt building at the time the photographs were taken. (Id.)
29. **INSTRUCTIONS—DEFINITION OF MALICE IN ARSON—HARMLESS ERROR.**—As the crime charged was not arson, an instruction given at the request of the people defining malice as a necessary in-

CRIMINAL LAW (Continued).

gradient in the offense of arson should have been omitted, but the giving of it did not constitute prejudicial error. (Id.)

- 80. ALLEGED MISCONDUCT OF DISTRICT ATTORNEY—OFFERING EVIDENCE OF OTHER FIRES.**—The conduct of the district attorney on several occasions in attempting to introduce testimony showing former fires which had occurred on the same and other premises belonging to one of the defendants, to which evidence objection was sustained, was not prejudicial, where the record shows that the offer was made in good faith and not for the wanton purpose of raising a prejudice against the defendant, and no suggestion was made during the trial of misconduct of the district attorney. (Id.)
- 81. EVIDENCE—CROSS-EXAMINATION OF DEFENDANT.**—Under section 1323 of the Penal Code, which provides that if a defendant in a criminal action offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief, the cross-examination is not necessarily confined to the particular details expressly contained in the questions on direct examination, but the people have the right to draw out anything which will tend to contradict the evidence of the defendant adduced on his direct examination or weaken or modify its effect. (People v. Turco, 608.)
- 32. BURNING OF INSURED PROPERTY—PROPER CROSS-EXAMINATION OF DEFENDANT.**—Where, in a prosecution for the crime of burning and destroying insured property for the purpose of defrauding the insurance company, the defendant, as a witness on his own behalf, made denial upon direct examination that he had given any money to certain persons for the purchase of materials to be used in burning the property, or that he had anything to do with the preparations for the fire or any knowledge thereof, it is not error to permit the people on cross-examination to ask the defendant a series of questions covering conversations to which one of such persons had testified as having had with the defendant on the subject of the burning of the property. (Id.)
- 33. IMPEACHMENT OF DEFENDANT—RECALL OF WITNESS IN REBUTTAL.**—It is not error to permit the people to recall in rebuttal the witness who had testified to some conversations had with the defendant, and allow him to testify as to the particular conversations which the defendant denied, by asking him whether certain quoted statements were made, instead of requiring the witness to state the conversation in his own language. (Id.)
- 84. CORROBORATION OF TESTIMONY OF ACCOMPLICE.**—Under section 1111 of the Penal Code, requiring that the testimony of an accomplice be corroborated, it is a sufficient compliance with the rule if the corroborative evidence showing the circumstances of the commission of the offense also tends to connect the defendant therewith. (Id.)



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35. **CREDIBILITY OF WITNESSES—QUESTION FOR JURY.**—Under section 19 of article VI of the constitution, the credibility of witnesses and all questions of fact are matters exclusively for the determination of the jury, which is the exclusive judge of the credibility of witnesses and the effect and value of the evidence addressed to it. (*People v. Stephens*, 616.)
36. **ASSAULT WITH INTENT TO MURDER—DEFENSE OF ALIBI—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.**—In a prosecution for the crime of assault with intent to commit murder, wherein the defense is based upon an *alibi* supported solely by the testimony of the defendant, it is for the jury to say whether such testimony should be believed, as against the testimony of witnesses whom it was sought to impeach. (*Id.*)
37. **EVIDENCE AGAINST DEFENDANT—SUFFICIENCY TO SUPPORT VERDICT—DECISION OF JURY—WHEN CONCLUSIVE.**—If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone the appellate court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive. (*Id.*)
38. **RULINGS ON EVIDENCE—LACK OF PREJUDICE.**—In this prosecution for the crime of assault with intent to murder, it is held that the numerous assignments of error predicated upon rulings upon the admission and rejection of evidence related to trivial matters, and even though the rulings should be considered erroneous, no substantial rights of the defendant were prejudiced thereby. (*Id.*)
39. **PRESUMPTION AS TO INTENT—ERRONEOUS INSTRUCTION—CONVICTION OF LESSER OFFENSE—LACK OF PREJUDICE.**—An instruction to the effect that, in the absence of evidence to the contrary, the "natural presumption must prevail" that one who assails another violently with a dangerous weapon, likely to kill, and which does in fact injure the party assailed, intended death or great bodily harm, is erroneous, as the existence of such an intent is a matter to be proved by the prosecution, but such instruction is not prejudicially erroneous where the defendant was convicted of a lesser offense. (*Id.*)
40. **CREDIBILITY OF WITNESSES—APPEAL.**—It is not the function of appellate courts to determine the credibility of witnesses and weigh their testimony, nor is it the rule in this state that prejudice must be presumed upon the showing of error. (*Id.*)
41. **TAKING OF INSTRUCTIONS TO JURY-ROOM—LACK OF PREJUDICE.**—The taking by the jury to the jury-room for reference, in considering their verdict, the instructions, which showed modifications of some of the requested instructions by erasures, is not prejudicial where

CRIMINAL LAW (Continued).

there is nothing in the changes made in the instructions given which could possibly have affected the minds of the jurors in reaching a verdict. (Id.)

- 42. CONTRIBUTION TO DEPENDENCY OF MINOR—SUFFICIENCY OF INFORMATION.**—An information charging a defendant with the crime of contributing to the dependency of a minor sufficiently states a public offense under the juvenile court law, where, after alleging that the minor was a female child of the age of fifteen years, without parent or guardian capable of exercising proper parental control over her, and that she “was and is wayward and addicted to vicious habits, and was and is in danger of being brought up to lead an idle, dissolute, and immoral life,” it charges him with encouraging, causing, and contributing to such dependency by enticing and persuading such minor surreptitiously and without the consent of her father to leave and remain away from her home, and to meet, be, and remain with the defendant under cover of darkness until a late and unusual hour of the night. (*People v. Oliver*, 576.)
- 43. EVIDENCE—OTHER ACTS OF IMPROPER CONDUCT.**—It is permissible to show that the defendant on other occasions than the specified date laid in the information had been guilty of improper conduct with the minor, as under the juvenile court law any conduct upon the part of a person toward a minor which either causes or tends to cause such minor to become or remain a dependent or delinquent person may be shown, and such conduct may consist of one act only or a series of acts. (Id.)
- 44. LACK OF PARENTAL CONTROL—SUFFICIENCY OF EVIDENCE.**—The allegation in the information that the minor had no parent or guardian capable of exercising proper control over her is sufficiently established, by evidence showing that the child’s father, who was her only guardian at the time in question, was either incapable of exercising or unwilling to exercise proper parental care over her. (Id.)
- 45. CONVICTION OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—A verdict of conviction is sufficiently supported by evidence showing a wayward minor female, with a strong inclination toward a wild and indifferent life, obtuse to perceptions of morality, without a parent or guardian capable of properly controlling her or her conduct, holding clandestine meetings at late hours of the night with a married man, almost old enough to be her father, and permitting him to take liberties with her person which would lead to immoral practices of the grossest character. (Id.)
- 46. EMBEZZLEMENT OF LEGACY—VENUE.**—In the prosecution of an executor for the embezzlement of a legacy, it cannot be contended that the venue of the offense was not proved as laid in the indictment, because of the fact that the defendant was in another county between the date of the order directing the payment of the legacy

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and the date of the order for the attachment of his person for his refusal to comply with such order, and from the latter date to the date of his indictment was confined in jail in the county in which the venue was laid. (*People v. Dates*, 260.)

47. **COMMISSION OF OFFENSE—TIME.**—The time of commission of such an offense is not limited to the period following the date of the order directing payment of the legacy by the executor, as the title of the legatee thereto does not take its inception from the date of such order, but from the date of death of the testator. (*Id.*)
48. **EVIDENCE—DECREE OF PARTIAL DISTRIBUTION.**—In such a prosecution, the decree of partial distribution directing the payment of the legacy is properly admitted in evidence, as the basis of the legatee's demand for the delivery of the legacy, notwithstanding that such decree had not become final through the expiration of the period within which it might have been appealed from at the time of its offer and admission in evidence. (*Id.*)
49. **PETITION FOR LEGACY—WAIVER OF INFORMALITIES.**—There is no error in admitting such decree in evidence by reason of the fact that the petition therefor was not signed by the legatee herself, but by her attorney, nor by the fact that she was a minor at the date of the filing, where it is shown at the time of the hearing of the petition that she was of age and personally appeared, and that the defendant also appeared and resisted her application. (*Id.*)
50. **PASSING CHECK WITHOUT FUNDS—PLEADING AND PROOF—IMMATERIAL VARIANCE.**—In a prosecution for the crime of passing a check without having sufficient funds in the bank upon which it was drawn to pay the amount specified therein, where the check offered in evidence corresponded in all respects with the copy set out in the information, except that the figure "1" appeared in the date line, making the wording "3-12 1915," instead of "3-2 1915," the variance between the pleading and the proof was immaterial and non-prejudicial, where it appeared in the evidence that the omission of the figure "1" before the "2" in the date line was a clerical error, and the evidence identified the check as being that which it was charged the defendant had unlawfully passed. (*People v. Freeman*, 543.)
51. **VARIANCE—TEST OF MATERIALITY.**—The test of the materiality of a variance is whether the indictment so fully and correctly informs the defendant of the criminal act with which he is charged, that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense. (*Id.*)
52. **EVIDENCE—CONDITION OF BANK ACCOUNT—STATEMENT OF BANK—ABSENCE OF ERROR.**—In such a case, where the cashier of the bank in which the defendant had an account prior to the date of the trans-

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action in question, was permitted, over the defendant's objection, to testify from a sheet made up from the books of the bank as to the state of the account, and the checks drawn against the credit which the defendant had had at the bank were introduced in evidence, the error, if any, was cured by the introduction of testimony by the defendant in which he admitted the passing of the check in question and that at the time he drew it he had no funds on deposit at the bank but claimed the situation was explained to the complainant. (Id.)

53. **INSTRUCTIONS—INTENT.**—In such a case there was no error on the part of the court in modifying an instruction offered by the defendant, which advised the jury that the intent of the defendant was "the all-important element," by making it read that the defendant's intent was "an" important element. (Id.)
54. **CHECK PAYABLE TO CASH OR BEARER—CONSTRUCTION OF SECTION 476, PENAL CODE.**—A check drawn to "cash or bearer" is such an instrument as is described in section 476 of the Penal Code, as it is an order for the payment of money. (Id.)
55. **FORGERY—EVIDENCE—EFFECT OF ADMISSIONS.**—In a prosecution for forging the names of two persons to the promissory note of the defendant, given to evidence the indebtedness of the defendant to the complaining witness of a certain sum of money which the latter had intrusted to the defendant to be loaned out by him on mortgage securities, and which he had improperly used in furthering a certain resilient tire scheme which he was promoting, it is not error to permit the state to prove the original intrusting of the money to the defendant for loan purposes, nor to prove a conversation had the day before the delivery of the note wherein the defendant admitted that he had falsely stated to the complaining witness that he had loaned the money upon mortgages, whereas he had in truth used the same for his own private business purposes, notwithstanding the admission by defendant's counsel preceding the opening statement of the district attorney that the sole defense to the charge would be that the defendant had authority to sign the names to the note, and the further admission, when the complaining witness was placed upon the stand, that the note was given as evidence of an antecedent debt. (People v. Cornell, 430.)
56. **MOTIVE—PROOF OF OTHER OFFENSES.**—Whenever the question of motive, or purpose, or reason for an act is involved, testimony showing such motive, reason, or purpose is always admissible, even though it may establish the commission of other offenses. (Id.)
57. **AUTHORITY TO SIGN NOTE—EVASIVE ANSWER—FURTHER INTERROGATION—RIGHT OF STATE.**—Where one of the persons whose name was forged is placed upon the stand by the state and makes evasive answer as to whether he had authorized the defendant to sign his name, it is not prejudicial error to permit the district attorney

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over objection to further interrogate the witness upon the subject. (Id.)

- 58. MISCONDUCT OF DISTRICT ATTORNEY—EXAMINATION OF DEFENDANT —MISSPENDING OF OTHER MONIES—ADMONITION TO DISREGARD.**—It is improper to ask the defendant on cross-examination as to whether or not he had not spent a great deal of money that he got from other people in the tire business in which he was engaged, but such misconduct is not prejudicial where the jury was promptly directed to disregard the question and not to draw any inference therefrom. (Id.)
- 59. INSTRUCTIONS — ACTS OF DEFENDANT — DRAWING OF DIFFERENT CONCLUSIONS—DUTY OF JURY.**—It is not error to refuse to instruct the jury to the effect that the law presumes innocence, and where two conclusions may be drawn from the defendant's acts the jury must find him not guilty, where the court gave instructions which covered in substance the only theories involved in the case to which the refused instructions could apply. (Id.)
- 60. VERDICT—RETURN FOR CORRECTION—WAIVER.**—Where at the time a verdict is returned no question is raised as to its form or sufficiency, and the objection is first presented to the trial court upon the defendant's motion for a new trial, the question whether the court should or should not have returned the verdict to the jury and directed reconsideration, as provided by section 1161 of the Penal Code, is not presented for consideration. (Id.)
- 61. SUFFICIENCY OF VERDICT.**—A verdict in such a prosecution in the following form is sufficient, to wit: "We, the jury in the above-entitled cause, find the defendant guilty of the crime of forgery, as charged in the indictment, of the promissory note set forth in the indictment; and we further find that said defendant forged the name of C. O. Cartwright to said promissory note, as charged in the indictment; and we further find the defendant guilty of uttering and passing the forged promissory note as charged in the indictment." (Id.)
- 62. LANGUAGE OF VERDICT.**—It is not essential that the language of a verdict should follow the strict rules of pleading or be otherwise technical, for whatever conveys the idea to the common understanding will suffice, and all fair intendments will be made to support it. (Id.)
- 63. FORGERY OF TWO NAMES — EVIDENCE — SUFFICIENCY AS TO ONE NAME—VERDICT.**—In such a prosecution the finding of the jury that the defendant was guilty of forging one of the two names to the note in question is sufficient to support the judgment, notwithstanding the evidence is insufficient to support a verdict that he was guilty of forging the other name thereto. (Id.)
- 64. INTOXICATING LIQUORS—KEEPING PLACE FOR SALE AND DISTRIBUTION—CHARACTER OF TERRITORY—INFORMATION.**—An information

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charging a defendant with the crime of keeping and conducting a place for the sale and distribution of alcoholic liquors in "no-license territory," should contain a direct averment that the territory was of such character, and the date when the ordinance so declaring became effective should be stated or proven. (*People v. Cavallini*, 526.)

65. EVIDENCE—KEEPING OF PLACE PRIOR TO DATE ALLEGED—PREJUDICIAL ERROR.—In a prosecution for the crime of keeping a place for the sale and distribution of alcoholic liquors in "no-license territory," where it is neither alleged in the information nor proven at the trial that the territory was "no-license territory" prior to the date alleged in the information, it is reversible error to admit evidence that the defendant prior to such date kept a place of public resort where alcoholic liquors were sold and distributed. (*Id.*)
66. INTOXICATING LIQUORS—SELLING AND FURNISHING WITHIN NO-LICENSE TERRITORY—INFORMATION—SINGLE OFFENSE.—An information charging a defendant with the crime of selling and furnishing alcoholic liquor within no-license territory is not subject to demurrer on the ground that it states two offenses. (*People v. Williams*, 552.)
67. SALE ON ISLAND IN SACRAMENTO RIVER—CHARACTER OF TERRITORY—CONSTRUCTION OF COUNTY ORDINANCE.—The sale of alcoholic liquors at and on a small tract of land, called Coney Island, lying in the Sacramento River just above the city of Red Bluff, in the county of Tehama, and near the boundary line between the first and third supervisorial districts of such county, which districts are "no-license territory," is a sale within "no-license territory," as the description of the boundary lines of such districts is to be construed so as to make the thread of the main channel of the Sacramento River the dividing line between them. (*Id.*)
68. COUNTIES—JURISDICTION OVER RIVERS.—Subject to whatever right the United States reserved in the control of the waters of the Sacramento River, for purposes of navigation or other purposes, the state was given the power to partition its territory into counties, including the beds of streams navigable or non-navigable, and was empowered to confer upon such counties the authority to exercise over all such partitioned territory the right to administer its government and to provide for the welfare of its inhabitants. (*Id.*)
69. CREATION OF SUPERVISORIAL DISTRICTS—TERRITORY INCLUDED—PRESUMPTION.—In construing the intention of the board of supervisors in enacting the ordinance creating the supervisorial districts of the county of Tehama, the then existing conditions must be considered, and it must be assumed that the board intended to include within the boundaries of the several districts all the territory of the county, and not to leave strips of territory lying between any two districts, whether consisting of land, or water, or both, without local government. (*Id.*)

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70. **PARTITIONING OF SUPERVISORIAL DISTRICTS—RULE AS TO PRIVATE GRANTS INAPPLICABLE.**—The partitioning of the territory of a county into administrative districts is not a grant in the sense that such term is used in section 830 of the Civil Code, which provides that except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, where there is no tide, takes to the edge of the lake or stream, at low-water mark. (Id.)
71. **COMMISSION OF LASCIVIOUS ACT—EVIDENCE—PROOF OF OFFENSE ALLEGED.**—In a prosecution under section 288 of the Penal Code, which makes punishable acts of a lascivious nature "other than the acts constituting other crimes provided for in part two of this code," it cannot be contended that the evidence established a different charge from that alleged in the information, in that the acts described by the prosecuting witness constituted an offense under section 288a of such code, where the latter section was not enacted until after the date of the offense alleged in the information. (People v. Love, 521.)
72. **CONSTRUCTION OF CODE—COMMISSION OF OFFENSE—CHILD UNDER FOURTEEN YEARS.**—The provision contained in section 288 of the Penal Code that the offense therein described may be committed by "any person," includes a child under the age of fourteen years. (Id.)
73. **ACTS OF SODOMY—RELEVANCY OF PROOF.**—Proof of prior lascivious acts, even though such proof tends to show the commission of the distinct crime of sodomy, is relevant for the purpose of illustrating the lascivious disposition of the defendant. (Id.)
74. **EVIDENCE—KNOWLEDGE OF WRONGFULNESS OF ACTS—EXCLUSION OF TESTIMONY—LACK OF PREJUDICE.**—In a prosecution for the commission of lascivious acts with a boy of the age of fourteen years, there is no error in sustaining an objection to a question addressed to the complainant as to whether or not he knew that the acts charged were wrong at the time of their commission, which question was asked for the purpose of showing that if the witness understood their wrongfulness, he became an accomplice, and his testimony required corroboration, in the absence of any outline by defendant's counsel of the purpose of the question, or request for an instruction as to the necessity of corroboration of the testimony of an accomplice, or an instruction calling the jury's attention to the matter as to whether the witness had sufficient understanding of the nature of the act committed to become an accomplice. (Id.)
75. **REPUTATION OF WITNESS—EXPRESSION OF OPINION—SUFFICIENCY OF FOUNDATION—DISCRETION.**—The question as to whether a sufficient foundation has been laid to warrant a witness in expressing an opinion as to general reputation is a matter especially committed

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to the judgment of the trial court, and unless that discretion is shown to have been abused there can be no prejudicial error. (Id.)

76. **SEXUAL OFFENSES—EVIDENCE—PROOF OF SIMILAR OFFENSES.**—In cases involving sexual offenses, such as adultery, rape, and the commission of lewd and lascivious acts upon the body of a child, evidence of similar offenses committed between the parties, both prior and subsequent to that with which a defendant is charged, may, if not too remote, be introduced after the prosecution has selected some particular act of a date certain, and has elected to rely on proof of such act for a conviction of the defendant, and has introduced evidence tending to support the selection. (*People v. Harlan*, 600.)

77. **COMMISSION OF LEWD ACT UPON CHILD—SIMILAR OFFENSES—PREJUDICIAL ERROR.**—In a prosecution for the commission of a lewd and lascivious act upon the body of a girl twelve years of age, it is error to permit the state to offer evidence as to acts constituting a similar offense alleged to have been committed on a date subsequent to that alleged in the information, where there was not at the time of the introduction of such evidence any evidence whatever adduced tending to show the commission of the offense alleged in the information. (Id.)

78. **TIME OF ELECTION OF OFFENSES.**—In a prosecution where the district attorney is at liberty to prove one of several different offenses under the indictment, he should, at least as early as the commencement of the trial, inform the defense upon proof of what specific offense he intends to rely, and if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and unless the precise offense is proven, the defendant is entitled to an acquittal. (Id.)

79. **EVIDENCE SHOWING COMMISSION OF OTHER OFFENSES—PURPOSE—ERRONEOUS INSTRUCTION.**—An instruction advising the jury that other lewd and lascivious acts had been shown by the evidence to have been committed by the defendant, and that such evidence was introduced for the purpose of proving the illicit relations of the defendant with the prosecuting witness, is error. (Id.)

80. **GRAND LARCENY—LOTTERY TICKET—INSUFFICIENCY OF INFORMATION.**—An information charging a defendant with the crime of grand larceny in stealing a lottery ticket fails to state a public offense, as such a ticket has no legitimate value except as the evidence of a debt due from an enterprise which is denounced by law and conducted in defiance thereof, and an allegation that the drawing had taken place prior to the alleged larceny and that the defendant had collected a large sum of money thereon, adds nothing to the value of the ticket. (*People v. Caridia*, 166.)

81. **SUBJECT MATTER OF LARCENY—PROPERTY HAVING VALUE.**—It is essential to the commission of the crime of larceny that the prop-

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erty alleged to have been stolen have some value—intrinsic or relative—which, where grand larceny is charged and the property was not taken from the person of another, must exceed the sum of fifty dollars. (Id.)

82. **LARCENY OF WRITTEN INSTRUMENTS—CONSTRUCTION OF SECTION 492, PENAL CODE.**—Section 492 of the Penal Code, which fixes the value in cases of the larceny of written instruments by providing that “if the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen,” contemplates and controls the value to be placed only upon written instruments which create some legal right and constitute a subsisting and enforceable evidence of a debt. (Id.)
83. **ILLEGAL CONTRACT.**—An obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value. (Id.)
84. **LOTTERY TICKET—PETIT LARCENY.**—A lottery ticket, considered as a mere piece of paper, possesses perhaps some slight intrinsic value, which, however small, is sufficient to make a wrongful taking of it petit larceny. (Id.)
85. **GRAND LARCENY—EMBEZZLEMENT—INSTRUCTION.**—Where in a prosecution for grand larceny it is contended that if any crime was committed, it was embezzlement, and not larceny, the court correctly instructed the jury as follows: “Embezzlement is when the possession of the property has been acquired lawfully and *bona fide* and afterward fraudulently appropriated. The gist of the offense of embezzlement is breach of trust imposed in the agent, employee, or bailee, by his principal, employer, or bailor, the crime may be in general terms defined to be the fraudulent conversion of another’s personal property by one to whom it has been intrusted. When a bailee of property obtains possession of it from the owner with the intention of stealing it, and carries out that intent, he is guilty of larceny; but where the intent to steal did not exist at the time of taking possession of the property by the bailee, but was conceived afterward, it is embezzlement.” (People v. Dye, 169.)
86. **SUFFICIENCY OF EVIDENCE.**—In this prosecution for grand larceny it is held that the verdict is sustained by the evidence. (Id.)
87. **EVIDENCE—STATEMENT OF DEFENDANT—DENIAL OF GUILT—FOUNDATION.**—It is not necessary to show, as preliminary to the admission in evidence of a statement made by the defendant in the district attorney’s office, that such statement was voluntarily made, where

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the statement was in no sense a confession of guilt but was in fact an assertion of innocence. (Id.)

88. ARGUMENT OF DISTRICT ATTORNEY—PUNISHMENT—HARMLESS ERROR.—It is error for the district attorney in his argument to the jury to call their attention to the fact that the punishment for embezzlement is exactly the same as the punishment for grand larceny, but such misconduct is not prejudicially erroneous where the jury is admonished to disregard the statement. (Id.)
89. GRAND LARCENY—THEFT OF HORSE—SUFFICIENCY OF EVIDENCE.—Upon a prosecution for grand larceny in stealing a horse in one county and driving it through other counties into the county where it was found in the defendant's possession, proof that the defendant assumed a false name when traveling with the horse, and at the time of its sale by him and when he was arrested, taken in connection with proof of such possession, and the inability to find the person from whom he claimed to have purchased the animal, is sufficient to support a verdict of conviction. (People v. Cox, 419.)
90. EVIDENCE—FALSEHOOD OF DEFENDANT—CONSCIOUSNESS OF GUILT.—When a person suspected of and charged with crime resorts to deception and falsehood, that is a circumstance which, like flight and concealment, tends to show a consciousness of guilt, and thereby strengthens any inference of guilt arising from other established facts. (Id.)
91. ARGUMENT OF DISTRICT ATTORNEY—COMMENT UPON INABILITY TO FIND ALLEGED SELLER OF HORSE—ABSENCE OF MISCONDUCT.—In such a prosecution it is not misconduct for the district attorney to comment upon the fact that the return upon one of the foreign subpoenas showed that the person from whom defendant claimed to have purchased the horse could not be found, and in stating that that was some evidence of the fact that such person was a mythical person, where such subpoenas and the returns thereon were offered and received in evidence without limitation upon their purpose. (Id.)
92. COMMENT UPON DEFRAUDING OF PURCHASER—ADMONITION TO DISREGARD—LACK OF PREJUDICE.—In such a prosecution it is misconduct to urge upon the jury a consideration of the fact that the defendant had defrauded the purchaser of the horse, but such misconduct is not prejudicial where it is checked almost at its inception by the intervention of the trial court, coupled with an admonition to the jury to disregard the statement. (Id.)
93. MURDER—FAILURE OF DEFENDANT TO TESTIFY—ERRONEOUS INSTRUCTION—ADMISSION OF KILLING BUT IN SELF-DEFENSE.—In a prosecution for murder, where the defendant did not testify in his own behalf, but stood silent under his plea of not guilty, an instruction that the defendant did not deny the killing but claimed that it

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was done in self-defense, is prejudicially erroneous, in the absence of direct testimony or other overwhelmingly convincing evidence connecting the defendant with the homicide, other than the alleged confession of the defendant. (*People v. Andrade*, 1.)

94. **EVIDENCE—POSSESSION OF MONEY BY DECEASED.**—Evidence with respect to the amount of money which the deceased had on his person two days previous to the finding of his body is admissible, where it is shown by other evidence that the deceased had the possession of such money the day before the finding of his body and then exhibited it in the presence of the defendant. (*Id.*)
95. **CONVICTION—COMMISSION OF CRIME WITH INTENT TO COMMIT ROBBERY—INSTRUCTION PROPERLY REFUSED.**—An instruction that "before you can convict the defendant of the crime charged, you must be satisfied beyond a reasonable doubt and to a moral certainty that he did commit such a crime with the intent and motive of robbery, and if you do not so find from the evidence herein, you must acquit him," is properly refused. (*Id.*)
96. **INVOLUNTARY MANSLAUGHTER—DEATH FROM GROSS NEGLIGENCE—DEGREE OF TURPITUDE.**—While involuntary manslaughter may be committed in two different ways, the legislature has not recognized, as between those ways, any distinction in the degree of turpitude characterizing that crime; in other words, the crime is that of involuntary manslaughter whether the killing be committed in the execution of an unlawful act, etc., or in the execution of a lawful act, etc., or where death, not willfully or intentionally produced, is, nevertheless, caused by the gross or culpable negligence of the defendant—negligence which, in degree, goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence, for which the party guilty of it may be held criminally liable. (*People v. Sidwell*, 12.)
97. **NEGLECT OF SPECIAL OFFICER—BREAKING INTO ROOM WITH LOADED PISTOL IN HAND—DISCHARGE FROM UNKNOWN CAUSE—VERDICT OF MANSLAUGHTER.**—In the prosecution of a deputy sheriff and special police officer for the crime of murder, it cannot be said, as a matter of law, that the jury were not justified in returning a verdict of involuntary manslaughter, where the evidence shows that the crime was committed by the discharge of a loaded revolver through some unknown cause, while in the hand of the defendant and while he was engaged in forcibly effecting an entrance into a room where gambling was going on, and where there was gathered a number of persons sitting about a table in close proximity to the door broken open by the defendant, and it appearing that he was aware of their presence therein. (*Id.*)
98. **VERDICT OF INVOLUNTARY MANSLAUGHTER—GROSS NEGLIGENCE OF DEFENDANT—REJECTION OF EVIDENCE—REFUSAL OF INSTRUCTIONS—**

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LACK OF PREJUDICE.—Where in a prosecution for murder one of the issues involved in the charge was whether, in the handling of the weapon, at the time of the fatal shooting, the defendant was culpably negligent, and if so, whether such negligence was the cause of the death of the deceased, and the jury returned a verdict of involuntary manslaughter, which crime involves no element of intent, but proceeds solely from a degree of negligence which makes the act of killing unlawful, the defendant was not prejudiced by alleged erroneous rulings in the exclusion of evidence and in the disallowance of instructions justifying his conduct in breaking into the room of the deceased, and his right to carry such weapon in his hand at the time of the breaking. (Id.)

99. **NEW TRIAL—MISCONDUCT OF JURY—AFFIDAVITS OF JURORS—MISTAKEN OPINION AS TO NATURE OF CRIME.**—A motion for a new trial upon the ground of the misconduct of the jury is properly denied where the same is based upon affidavits of two of the jurors, in which they alleged that they were at all times during the deliberations of the jury of the opinion that the defendant was entitled to an acquittal at their hands, and so voted up to the time that they were led to believe that the crime of involuntary manslaughter was not a felony under the laws of the state of California, and that had they known or believed that it was a felony, they never would have agreed to a verdict of guilty of such crime. (Id.)
100. **CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.**—An instruction that “there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence,” and that “a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts, if true, the fact on which the guilt or innocence depends must follow,” while lacking in clearness of expression and not strictly grammatical, is not misleading. (People v. Lim Foon, 270.)
101. **DYING DECLARATION—DISREGARD BY JURY—INSTRUCTION PROPERLY REFUSED.**—An instruction in which it was declared that dying declarations should be received with caution, and that unless it appeared that the declaration made by the deceased just prior to his death accusing the defendant of having fired the fatal shots was made “under a clear opinion of impending death, you cannot consider such declaration as evidence in this case, and the court cautions you . . . not to give as much weight to such evidence as if the same statement had been testified to in health and subject to cross-examination,” is properly refused, where the jury was instructed to receive with caution the evidence of the dying declaration “for the reason that the declarant had not been administered an oath, and an opportunity for cross-examination has not been afforded the defendant and that the declarant might be influenced against the defendant,” and for the further reason that the physical con-

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dition of the deceased when making the statement might have been such as to render questionable the reliability of his declaration (Id.)

102. **IDENTITY OF MUDDERER—CONFLICT OF PROOF—DUTY TO ACQUIT DEFENDANT—INSTRUCTION PROPERLY REFUSED.**—An instruction in a prosecution for murder that if the jury believed from the evidence that the person who fired the fatal shots was a man taller and heavier than the defendant, it was their duty to acquit the defendant, "notwithstanding that certain witness or witnesses may testify that the person who fired such shots was said defendant, nevertheless, there would exist such a conflict as to the identity of the person who fired such shots as to raise a reasonable doubt as to whether or not it was the defendant," is properly refused. (Id.)
103. **ACQUITTAL OF DEFENDANT—REASONABLE DOUBT OF GUILT BY SINGLE JUROR—INSTRUCTION PROPERLY REFUSED.**—An instruction advising the jury that if after considering all the evidence "a single juror has a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, then they cannot convict him," is properly disallowed, where the court instructed all the jurors that if they entertained a reasonable doubt of the defendant's guilt or "upon a single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit him." (Id.)
104. **CREDIBILITY OF DYING DECLARATION—BELIEF IN HEREAFTER—INSTRUCTION PROPERLY REFUSED.**—An instruction that if the jury believed that the deceased "had no fear of God" and "had no conception of life after death wherein he would receive punishment for failure to tell the truth," then his alleged dying declaration should be disregarded "for the reason that there was no compelling cause to tell the truth in the hour of his impending death," is properly refused, in the absence of any evidence addressed to such matter other than the implication that the defendant might have been an adherent of a heathenish religion from the fact that he was a Chinaman. (Id.)
105. **MAKING OF DYING DECLARATION—DESIRE TO WREAK VENGEANCE—INSTRUCTION PROPERLY REFUSED.**—An instruction that if the jury found that the deceased was actuated in making his alleged dying declaration "by the desire to wreak vengeance upon some person whom he might believe was a member of a society or a relative of a member of such society which was an enemy of a society to which the deceased belonged," it would then be their duty wholly to disregard such declaration, is properly refused, in the absence of any evidence justifying such implication. (Id.)
106. **DYING DECLARATION—EVIDENCE.**—A dying declaration is admissible when it is made to appear that the declaration was made by

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a dying person under a sense of impending death, and that such declaration related to the cause of his death. (Id.)

107. **EVIDENCE—FLIGHT OF DEFENDANT—CROSS-EXAMINATION OF WITNESS—LIMITATION NOT ERRONEOUS.**—Where a witness to the homicide is subjected to an extended cross-examination as to the direction in which the defendant ran immediately following the shooting, it is not prejudicial error to restrict the further examination of the witness as to how near he was to the defendant when the latter passed him. (Id.)
108. **EXAMINATION OF WITNESSES—DUTY OF COURT.**—Where it is evident to the trial court, after a full and exhaustive examination of a witness upon a subject concerning which particular information is desired, that nothing more can be accomplished by continuing the inquiry, it is the duty of the court to put an end to such examination. (Id.)
109. **NEW TRIAL—IMPEACHING EVIDENCE.**—It is not an abuse of discretion to refuse a new trial in such a prosecution upon the ground of newly discovered evidence, where it is apparent from the affidavits in support of the motion that the only purpose which the evidence referred to therein could accomplish would be the impeachment of two witnesses who testified for the prosecution and whose testimony was itself wholly in impeachment of the testimony of the defendant and his witnesses upon the question of the *alibi* sought to be shown by the accused. (Id.)
110. **MURDER—EVIDENCE—PROOF OF CORPUS DELICTI—ADMISSION.**—In a prosecution for murder proof of the *corpus delicti* of the conclusive and convincing character required to support a conviction of the crime charged is not a prerequisite to the reception in evidence of the extra-judicial statements of the defendant that he had killed the deceased, but *prima facie* proof is sufficient for that purpose. (People v. Wagner, 363.)
111. **SUFFICIENCY OF PROOF OF CORPUS DELICTI.**—In this prosecution of a son for the murder of his father, it is held that the evidence was sufficient *prima facie* to establish the *corpus delicti* as the foundation for the admission in evidence of the extra-judicial statements of the defendant that he caused the death of the deceased. (Id.)
112. **ADMISSIONS OF DEFENDANT—ORDER OF PROOF.**—In the absence of a showing of prejudice, there is no error in admitting in evidence the defendant's extra-judicial statements prior to the proof of the *corpus delicti*. (Id.)
113. **RESULT OF EXPERIMENTS—WHEN INADMISSIBLE.**—In a prosecution for murder it is prejudicial error to permit the state, over the objection of the defendant, to show the result of certain experiments made by the district attorney and peace officers with shots fired from the gun which killed the deceased at and into cardboards and

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blocks of wood which were intended to represent the deceased, for the purpose of rebutting the statements of the defendant that the killing was accidental, in the absence of a showing that the experiments were made under circumstances and conditions which were the same, or substantially the same, as those which existed when the killing occurred. (Id.)

114. **EVIDENCE OF EXPERIMENTS—DISCRETION—PRELIMINARY PROOF.**—While the admission of evidence showing the results of experiments is largely within the discretion of the trial court, nevertheless the admission of such evidence is regulated and must be controlled by the well-settled rule that it must be first shown that the experiments relied upon were made under conditions and circumstances which were essentially the same as those which existed when the alleged occurrence took place. (Id.)
115. **INSTRUCTION—IMMATERIALITY OF EVIDENCE OF EXPERIMENTS.**—An instruction declaring that the evidence of the results of experiments should not be “considered material and effective nor conclusive, but as a mere circumstance to be considered in connection with other evidence in the case,” is erroneous in the particular that it declares that evidence of the results of experiments was neither material nor effective, and should not be given, notwithstanding it correctly stated the law to the extent that such evidence was to be considered by the jury with the other evidence in the case. (Id.)
116. **CONFLICTING RESULTS OF EXPERIMENTS—DISREGARD BY JURY—ERRONEOUS INSTRUCTION.**—An instruction to the effect that if the evidence of the respective experiments made by the prosecution and defendant under similar circumstances showed different results, then the result of each experiment should be disregarded by the jury, is erroneous, as such a situation amounts to no more than a conflict of evidence, which should be left to the jury for decision. (Id.)
117. **EXPERIMENTS UNDER DIFFERENT CONDITIONS—DISREGARD OF EVIDENCE—PROPER INSTRUCTION.**—The refusal to instruct the jury to the effect that the evidence of the results of the experiments made by the prosecution should be disregarded unless the jury found that those experiments were made under conditions and circumstances which were the same, or substantially the same, as those which existed at the time of the killing, is error, as the determination of the trial court before ruling upon the admissibility of such evidence is not conclusive upon the jury. (Id.)
118. **ORAL ADMISSIONS—CAUTIOUS CONSIDERATION—REFUSAL OF INSTRUCTION—ABSENCE OF ERROR.**—The refusal to instruct the jury to the effect that evidence of oral admissions should be viewed and considered by the jury with caution is not reversible error. (Id.)
119. **CONVICTION UPON ADMISSIONS—ESTABLISHMENT OF CORPUS DELICTI—REQUESTED INSTRUCTION—REFUSAL PREJUDICIAL ERROR.**—In this

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prosecution it is held that under the particular and peculiar circumstances the court erred to the substantial prejudice of the defendant in refusing to charge the jury at the request of the defendant as follows: "You are instructed in this case that before you can convict the defendant you must be convinced from the evidence beyond a reasonable doubt and to a moral certainty that a criminal homicide was in fact committed; and you must be so convinced by evidence other than or in addition to the statements or admissions of the defendant, and this evidence must be sufficient to establish that the death of the deceased was produced by the criminal act of some person and was not the result of accident. The production of the dead body does not alone establish the criminal homicide; and proof of the dead body alone found, with the statements of the defendant, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before the statement of the defendant would be admissible for any purpose; and hence if you believe in this case that the only evidence which shows that a crime was committed is the production of the dead body of the deceased, coupled with the admissions or statements of this defendant, then it is your duty to acquit this defendant." (Id.)

120. **EXTRA-JUDICIAL CONFESSIONS—WHEN INSUFFICIENT.**—A defendant charged with crime must not be convicted upon his extra-judicial confessions or admissions, unless such confessions or admissions be corroborated by proof *abunde* of the *corpus delicti*. (Id.)
121. **MURDER—CREDIBILITY OF WITNESS—IMPROBABILITY OF COMMISSION OF CRIME BY DEFENDANT—APPEAL—REVIEW.**—Upon appeal from the judgment and order denying a new trial in a prosecution for the crime of murder, it cannot be urged as grounds for reversal that the jury should not have believed the testimony of the chief witness for the prosecution as to an alleged confession made to him by the defendant because of the existence of a feeling of unfriendliness between the witness and the defendant, and the improbability of the commission of the crime by the defendant by reason of his departure and return to the place of the crime, and such questions were for the determination of the jury, and of the trial court upon the motion for a new trial. (*People v. Villalovas*, 537.)
122. **MURDER—INSTRUCTIONS—WHEN REFUSAL TO INSTRUCT ON MANSLAUGHTER ERRONEOUS.**—In a prosecution for murder the court may properly refuse to instruct the jury that they may return a verdict of manslaughter, if the evidence clearly shows that the crime committed was not manslaughter; but where the evidence is such that the jury would be warranted in returning a verdict of manslaughter, it is prejudicial error for the court to refuse, at the request of the defendant, to instruct the jury that it might, if the evidence warranted it, find the defendant guilty of manslaughter. (*People v. Wilson*, 563.)

CRIMINAL LAW (Continued).

123. **MANSLAUGHTER—DEFINITION.**—Manslaughter is the unlawful killing of a human being, without malice; and one of the conditions described in the code definition is that of an involuntary killing "in the commission of an unlawful act, not amounting to felony." (*Id.*)
124. **MURDER—PREJUDICIAL REMARKS OF COURT—INTIMATION OF FALSITY OF DEFENSE.**—In a prosecution for murder it is prejudicial error for the court, in the presence and hearing of the jury, when ruling upon an objection to evidence offered in support of the defendant's plea of self-defense, to remark that the claim that the deceased took the dagger, by means of which the killing was accomplished, from the person of the defendant was "an absurdity," and that the alleged threat of the deceased to kill the defendant was "a mere idle statement made by the deceased." (*People v. Pitisci*, 727.)
125. **INSTRUCTION—DISCLAIMER OF OPINION—ERROR NOT CURED.**—Such error is not cured by an instruction given to the jury upon the conclusion of the argument upon the admissibility of such evidence that there was no intent upon the part of the court to show its belief in either the truth or falsity of the testimony, nor to intimate any personal view as to its value. (*Id.*)
126. **INSTRUCTION TO DISREGARD MISCONDUCT—REMOVAL OF PREJUDICE—GENERAL RULE INAPPLICABLE.**—While, ordinarily, an admonition of the trial court to the jury to disregard misconduct of either the judge or district attorney will, in the absence of an affirmative showing of injury, suffice to remove any prejudice resulting therefrom in the minds of the jury, which rule is founded upon the presumption that the jury will heed the admonition of the trial judge, such presumption does not prevail in the presence of an impropriety upon the part of the trial judge, which in its very nature was calculated to weaken, if not utterly destroy, a legitimate and substantial defense apparently interposed in good faith. (*Id.*)
127. **ALLEGED THREAT OF DECEASED—PROOF BEYOND REASONABLE DOUBT—ERRONEOUS INSTRUCTION.**—An instruction given at the request of the prosecution which in effect charged the jury not to consider the alleged threat of the deceased to kill the defendant, unless that fact had been clearly established in evidence beyond all reasonable doubt, is clearly erroneous, as such fact need be proved only by a preponderance of the evidence. (*Id.*)
128. **MISCONDUCT OF DISTRICT ATTORNEY—STATEMENT OF CONTENTS OF EXCLUDED LETTER.**—It is misconduct for the district attorney to state to the court, in the presence and hearing of the jury, the contents of a letter addressed to the deceased and purporting to have been written by her husband, upon a second attempt to get the letter in evidence, where the letter had been read by the court upon its first offer. (*Id.*)

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- 129. PERJURY—DENIAL OF COLLECTION OF JUDGMENT—JUDGMENT SET ASIDE.**—A prosecution for perjury against an attorney based upon a charge that he falsely denied under oath that he collected and received a certain sum of money on account of, and in settlement of, a judgment obtained in an action in favor of his client, cannot be maintained where it appears from the proof that the only judgment rendered in the action was set aside by reason of an error in computation of the amount found to be due. (*People v. McLeod*, 539.)
- 130. UNCERTAINTY IN EVIDENCE—GRANTING NEW TRIAL—DISCRETION OF COURT.**—In such a case, where it appeared that the evidence in the action brought by the defendant for his client upon a claim against a third party was indefinite and uncertain as to whether the defendant herein had received anything which he had a right to deem paid to him in settlement of the claim sued upon, there was no abuse of discretion on the part of the trial court herein in making a general order granting a new trial. (*Id.*)
- 131. SATISFACTION OF JUDGMENT—DELIVERY IN ESCROW—ESTOPPEL—BURDEN OF PROOF.**—In an action brought by the client against the attorney for money had and received, the defendant was not estopped from denying that he received full payment of the judgment because his answer admitted, by not denying, the execution of the satisfaction, where it appears that the satisfaction was placed in escrow and it was not shown that it was filed or even delivered to anyone authorized to file it, except upon conditions not shown to have been performed; and, moreover, the action being for money had and received in a certain sum alleged to have been received by defendant for the use of plaintiff, it devolved upon plaintiff to show that defendant received said sum, or some part thereof, in order to recover judgment. (*Id.*)
- 132. RAPE—FEMALE UNDER AGE OF CONSENT—EVIDENCE—CORROBORATION—ACCOMPLICE.**—A female under the age of consent is not an accomplice in the crime of rape committed upon her, nor does the law require that her testimony be supported by corroboration in order to sustain a conviction. (*People v. Bernon*, 424.)
- 133. MISCONDUCT OF DISTRICT ATTORNEY—LACK OF PREJUDICE.**—In a prosecution for rape on a girl under the age of consent it is misconduct for the district attorney, on cross-examination of a witness, to ask whether the sister of the prosecutrix told the witness that defendant, her father, did the same things to her that he was charged with doing to the prosecutrix; but where the court sustained the objection of the defense to the question and charged the jury to disregard the statements of counsel and all evidence not presented in a legal way, and the district attorney abandoned the subject, the misconduct was not prejudicial. (*Id.*)

See Attorney at Law, 1, 2; Parent and Child.

DAIRY.

1. **DAIRY ACT—FAILURE TO REGISTER DAIRY—VALIDITY OF CONTRACTS FOR SALE OF MILK—MAINTENANCE OF ACTIONS—CONSTRUCTION OF STATUTE.**—An owner of a dairy where more than four cows are milked is not prohibited from maintaining an action for the sale of milk on the theory that the contract for the sale was void because of the failure of such owner to register his dairy with the state dairy bureau, as required by sections 6 and 16 of the Dairy Act (Stats. 1911, p. 959), as such act does not prohibit the sale of milk which is pure and wholesome, from an unregistered dairy, but merely makes the failure to register a misdemeanor. (*Luchini v. Roux*, 755.)
2. **ACTION FOR MILK SOLD—CAPACITY TO SUE—SUFFICIENCY OF FINDINGS.**—In an action to recover for the sale of milk by the owner of an unregistered dairy, the finding "that the sale of milk . . . was not a wrongful sale within the meaning, or in violation of sec. 16, or of sec. 29, or of sec. 6, or of any section whatever of the Act of the Legislature, etc.," sufficiently covers the issue raised by the allegations of the answer as to the lack of legal capacity in the plaintiff to sue by reason of his omission to register his dairy as required by the statute. (*Id.*)

DAMAGES.

1. **BREACH OF CONTRACT OF PURCHASE—GROWING CROP OF APPLES—LOSS BY ELEMENTS—EXCESSIVE JUDGMENT.**—In an action for damages for breach of a contract to purchase a growing crop of apples, it is error to award the plaintiff, as damages, the full contract price, without taking into account the cost of picking, nailing the shook, and hauling the apples to the designated point of shipment and putting them on board the cars, which the plaintiff was obligated to do under the terms of the contract, notwithstanding the apples were destroyed by the elements before harvesting through the alleged fault of the defendant in not furnishing the necessary materials and boxes for such purpose. (*Griffith v. Welbanks & Co.*, 238.)
2. **TRUE MEASURE OF DAMAGES—SECTION 3300, CIVIL CODE.**—In an action for damages for breach of a contract to purchase a growing crop of apples which was destroyed by the elements before it was harvested, and was never in a condition to be delivered to the buyer, section 3300 of the Civil Code, and not section 3311, furnishes the true measure of damages. (*Id.*)
3. **EVIDENCE—MARKET VALUE OF APPLES.**—Where there is a dispute as to the contract price of the apples, it is error to strike out testimony as to their market value. (*Id.*)

See *Frand*, 1-4; *Lease*, 1, 2; *New Trial*, 9-11; *Sale*, 1-7, 27; *Vendor and Vendee*, 4-6.

DEBTOR AND CREDITOR. See *Account*; *Bankruptcy*; *Deed*, 4, 5; *Fraud*, 9; *Fraudulent Conveyance*.

DEED.

1. **DELIVERY TO THIRD PARTY—VESTING OF TITLE—ESSENTIALS.**—It is absolutely essential to the validity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee beyond any power in the grantor to recall or revoke it. (*Ragan v. Ragan*, 63.)
2. **QUIETING TITLE—DELIVERY OF DEED—FINDING SUPPORTED BY EVIDENCE.**—In this action to quiet title, wherein the real question at issue was whether or not the deed under which the defendant claimed title was ever in fact delivered by plaintiff's intestate, it is held that the evidence is sufficient to support the finding that the grantor, about three weeks before his death, delivered the deed to the grantee with the intention that the title should vest absolutely in the latter, regardless of whatever doubt may be entertained as to the sufficiency of the first manual tradition of the deed to constitute a legal delivery. (*Id.*)
3. **COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND—VALUABLE CONSIDERATION—CONSENT OF WIFE NOT NECESSARY.**—The husband has the right to make a conveyance of the community property without the consent of his wife, where it is made upon a valuable and adequate consideration. (*Id.*)
4. **CONVEYANCE TO HUSBAND AND WIFE—TENANTS IN COMMON—ASSUMPTION OF MORTGAGE—PERSONAL LIABILITY.**—The insertion of the names of a husband and wife as grantees in a deed creates the relation of tenants in common between them, and where the grantees accept such a deed containing a provision that the deed is subject to a deed of trust and also a mortgage which the grantees agree to pay, the latter become personally liable for the amount of the obligations which the encumbrances secure, after such security is properly exhausted, even though the signature of the grantees is not appended to the deed. (*Lick v. Anderson*, 491.)
5. **LIABILITY OF WIFE—SUFFICIENCY OF EVIDENCE.**—In such a case, where there was substantial evidence, in addition to that furnished upon the face of the deed and the fact that the wife several months after the execution and delivery of the deed to her husband joined in a conveyance of the property and of the title insurance policy, to the effect that she was made aware of the fact and contents of the deed, at or about the time of the transaction, and the title of the property was permitted to remain in their names as tenants in common for several months with such knowledge and without any objection on her part, the evidence is sufficient to sustain a finding that the transaction was not one in which the husband was dealing with his separate property, but that the property received by himself

DEED (Continued).

and his wife was community property, and that the latter was consulted and advised as to the same. (Id.)

See Adverse Possession, 1, 4; Bona Fide Purchaser; Fraudulent Conveyance.

DEFAULT. See Practice, 6.

DIVORCE.

1. **SUBSEQUENT ACTION—RES ADJUDICATA.**—In an action for divorce, wherein the decree was granted to the wife upon her cross-complaint alleging extreme cruelty, the plaintiff cannot contend that the matters set up in such cross-complaint were made issues by the respective pleadings in a former divorce action denying the parties a divorce, where the plaintiff in his answer to such cross-complaint failed to plead to such judgment, and there is nothing in the record relating to such judgment, other than the mere pleading of the same in the answer to the original complaint. (Benson v. Benson, 87.)
2. **EXTREME CRUELTY—ACTS SUBSEQUENT TO FORMER JUDGMENT—PLEA OF RES ADJUDICATA NOT MAINTAINABLE.**—A plea of *res adjudicata* cannot be maintained against an action for divorce on the ground of extreme cruelty, where the acts charged occurred after the judgment in the former action was rendered. (Id.)
3. **EVIDENCE—WILLINGNESS TO RETURN TO HUSBAND—EXCLUSION OF TESTIMONY—LACK OF PREJUDICE.**—In an action for divorce wherein a decree was granted to the wife upon her cross-complaint alleging extreme cruelty, it is not prejudicial error to refuse to permit her on cross-examination to state whether or not she was willing to go back to her husband, and live with him, where it appears from the evidence that such question would have been answered in the negative if allowed, and that both parties had been persistently engaged in an effort to get rid of each other upon what appears to be sufficient reason. (Id.)
4. **SUPPORT AND MAINTENANCE OF MINOR CHILDREN—REASONABLE ALLOWANCE.**—An allowance of fifteen dollars per month to each of the three minor children of the marriage for their support and maintenance is not unreasonable as against the father, where he is shown to be a carpenter and building contractor, earning good wages, and usually employed. (Id.)
5. **DEFAULT—FINDINGS—CONSTRUCTION OF SECTION 131, CIVIL CODE.**—Under the provision of section 131 of the Civil Code, requiring that in actions for divorce the court must file its decision and conclusions of law "as in other cases," the quoted words refer to the form of the findings, and are not to be taken as intended to relieve the trial judge in cases where default has been entered in a divorce action against one of the parties from making his decision in writing. (Perkins v. Perkins, 68.)

DIVORCE (Continued).

6. **DEFAULT—ISSUES.**—In view of the code provision that no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, there are issues to be tried in actions where the adverse party has suffered default, as well as in cases where answers are filed. (Id.)
7. **EXTREME CRUELTY—GRIEVOUS MENTAL SUFFERING.**—In order to constitute extreme cruelty of the character of grievous mental suffering, it is no longer necessary, as announced in the earlier decisions, that a perceptible effect of such suffering should be produced upon the body or health of the complaining party, but the rule is that whether in any given case there has been inflicted "grievous mental suffering" is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party. (Id.)
8. **EVIDENCE—DISAGREEABLE CONDUCT OF DEFENDANT—UNWARRANTED RESTRICTION OF PLAINTIFF'S EXAMINATION.**—In an action for divorce on the ground of extreme cruelty, it is prejudicial error to refuse to permit the plaintiff, while being examined by her own counsel, to testify as to the acts of the defendant at the times he would intrude himself upon her privacy, on the ground that the witness should not be embarrassed as to matters that could not be corroborated, and that such testimony would be of no value and disregarded by the court. (Id.)
9. **RIGHTS OF LITIGANTS—DUTY OF COURT.**—In actions for divorce, the complaining party has the same right as any other litigant in any other class of actions, not only to the opportunity to present fully his or her case, but to every reasonable assistance of the court in the premises. (Id.)
10. **SUBJECT OF MENTAL CRUELTY—TESTIMONY OF PHYSICIANS.**—In such an action, physicians of the plaintiff may testify generally as to the subject to which plaintiff ascribed her disturbance of mind and health when she consulted them, as corroborative of her claim that the same was due to marital difficulties. (Id.)
11. **CORROBORATION OF ACTS OF CRUELTY.**—When the cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff. (Id.)
12. **RECORD ON APPEAL—AFFIDAVIT NOT PART OF JUDGMENT-ROLL.**—On an appeal from an order setting aside a final decree of divorce, an affidavit in the transcript which appellant claims contains a state-

DIVORCE (Continued).

ment of facts which led the lower court to make an order for *nunc pro tunc* entry of the interlocutory decree, which affidavit comes into the transcript under a certificate describing it as part of the judgment-roll, but which is not a part of the judgment-roll and does not appear to have been one of the papers used in connection with the order from which the appeal is taken, cannot be legally taken cognizance of. (*Nolte v. Nolte*, 126.)

13. **SUFFICIENCY OF FACTS TO AUTHORIZE ORDER—PRESUMPTION.**—Such defect is immaterial, since facts sufficient to satisfy the court may have existed and may have been shown to the court; and, since no appeal appears to have been taken from the judgment, it will be presumed that the court had before it facts sufficient to authorize such order to the full extent that the order may legally be made under any circumstances. (*Id.*)
14. **JUDGMENT—ENTRY NUNC PRO TUNC.**—While the power of a court over its records, in order to make them speak the truth, is fully recognized, and for that purpose errors or omissions in the entry of judgments may in some instances be corrected by entering them as of the date when rendered, the full effect of a *nunc pro tunc* order is limited so as to prevent results not contemplated by the law. (*Id.*)
15. **ENTRY OF INTERLOCUTORY DECREE NUNC PRO TUNC—VOID ENTRY OF FINAL DECREE.**—Section 131 of the Civil Code contemplates that a final decree of divorce shall not be entered until after the expiration of the time within which an appeal may be taken from the interlocutory decree, nor during the pendency of such appeal if taken, and the entry of the interlocutory decree *nunc pro tunc* as of an earlier date does not affect the time prescribed within which an appeal may be taken; and the entry of a final decree within a week after the *actual* entry of the interlocutory decree *nunc pro tunc* as of a date one year previous is void, and may be vacated on motion of either party or of the court. (*Id.*)

EASEMENT.

RIGHT OF WAY BY NECESSITY.—A right of way by necessity can only be claimed and held where it furnishes the only way by which access may be had to the property of the claimant. (*Lapique v. Morrison*, 136.)

See Adverse Possession, 2, 3.

EJECTMENT.

1. **EXECUTORY CONTRACT OF SALE—RECOVERY OF POSSESSION BY VENDOR—PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint in an action by a vendor to recover the possession of land of which the vendee was in possession under an executory contract of sale,

EJECTMENT (Continued).

which alleges ownership and right of possession in the plaintiff and the failure of the defendant to comply with the terms of the contract as to the payment of the price, followed by an allegation of demand for such payment or possession, states a cause of action in ejectment. (*Sweet v. Richvale Land Co.*, 111.)

2. **RECOVERY OF POSSESSION AND MONEY DUE—JOINDER OF CAUSES OF ACTION—ERROR WITHOUT PREJUDICE.**—An objection that a cause of action for the money due under the contract had been improperly joined with the action for the recovery of the possession of the land, should be made by demurrer on that ground, but any error in such a misjoinder is without prejudice, where all claims for a money judgment are waived. (*Id.*)
3. **AMENDMENT OF COMPLAINT—CAUSE OF ACTION NOT CHANGED.**—There is no error in allowing the plaintiff to amend the complaint after submission of the cause by adding thereto the allegation that the contract provided that in the event of a failure to comply with its terms, the defendant forfeited all rights to the property and the plaintiff was released from all obligations to convey. (*Id.*)
4. **JUDGMENT FOR POSSESSION—FORFEITURE INCLUDED.**—In such an action a judgment for possession of the land necessarily involves the forfeiture of all rights of the defendant under the contract. (*Id.*)

ELECTION.

1. **ELECTION CONTEST—DELAY IN OPENING POLLS—ABSENCE OF FRAUD—PRECINCT VOTE NOT INVALIDATED.**—In an election contest it is error to reject the entire vote of a precinct because of a delay of one hour and fifteen minutes in the opening of the polls, where such delay was not due to any fraudulent intent or design on the part of the election officers, but solely to the loss of the key to the polling place and the consequent inability to gain earlier access thereto. (*Thornber v. Hart*, 284.)
2. **OPENING OF POLLS—DELAY CONSISTENT WITH HONESTY—BURDEN OF PROOF.**—It must be from the nature and necessity of the case that the legislature intended that some margin, even though narrow, should be allowed for honest effort to comply with the statute, and did not intend that the vote of any precinct should be invalidated because the polls were not open at the very instant of sunrise; and any person seeking to take advantage of omission in such regard must allege some delay sufficient to show a transgression of the statute inconsistent with an honest and intelligent endeavor to obey its command, or that the violation of its letter on which he relies has operated to obstruct the full and fair expression of the suffrage of the precinct. (*Id.*)
3. **REFERENDUM PETITION—NUMBER OF SIGNATURES—CONSTRUCTION OF CHARTER OF BAKERSFIELD.**—Under the charter of the city of Bakers-

ELECTION (Continued).

field approved by the legislature of 1915 (Stats. 1915, p. 1552), the words "general election" contained in section 32 of such charter, relating to referendum elections, and therein requiring that a petition protesting against the passage of an ordinance must be "signed by electors of the city, equal in number to twenty-five per centum or more, of the entire vote cast at the last general election," when read with other sections of such charter relating to such elections, have reference to the last general municipal election, and not to the last general state election. (*Bakersfield & Kern Electric Ry. Co. v. Hay*, 289.)

4. **SUFFICIENCY OF PETITION—LAST MUNICIPAL ELECTION PRIOR TO CHARTER—WHEN CONTROLLING.**—The sufficiency of the signatures to such a petition is to be tested by the last general municipal election held in the city prior to the adoption of the charter, if it be conceded that the election held after such adoption was not a general municipal election, by reason of the fact that councilmen were not elected in all of the wards of the city. (Id.)
5. **DIRECT LEGISLATION BY CITIES AND TOWNS—ACT INAPPLICABLE TO CITY OF BAKERSFIELD.**—The act to provide for direct legislation by cities and towns, including initiative and referendum (Stats. Ex. Sess. 1911, p. 181), and which requires such petitions to be signed by qualified electors of the city or town "equal to ten per cent of the entire vote cast therein for all candidates for Governor of the state at the last preceding general election at which a Governor was voted for," has no application to the city of Bakersfield, even if it be conceded that the referendum provisions of the charter of such city are modeled upon the terms of such statute. (Id.)
6. **REFERENDUM PETITION—ELECTION—CITY OF BAKERSFIELD.**—Writ of mandate denied on the authority of *Bakersfield & Kern Electric Ry. Co. v. Hay*, ante, p. 289. (*Bakersfield & Kern Electric Ry. Co. v. Hay*, 793.)

ELECTRIC LIGHT AND POWER CO. See Negligence, 6-11.

EMBEZZLEMENT. See Criminal Law, 46-49.

EMINENT DOMAIN.

1. **ATTORNEYS' FEES AS COSTS—CONSTITUTIONAL PROVISION.**—The portion of section 1255a of the Code of Civil Procedure which authorizes the court upon the abandonment by the plaintiff of a proceeding in eminent domain to include in the costs assessed against the plaintiff the fee of the defendant's attorney in the proceeding, is not violative of the fourteenth amendment of the federal constitution, nor of the provisions of the state constitution requiring that laws of a general nature shall be uniform in their operation and prohibit-

EMINENT DOMAIN (Continued).

ing the passage of special laws. (*City of Sacramento v. Swanston*, 212.)

2. **CHARACTER OF PROCEEDING.**—The proceeding to condemn property under the right of eminent domain is so differentiated from the ordinary actions or proceedings in courts of justice as to bring it within the settled test justifying the assignment of the proceeding to a particular class, for the purpose of reasonable provisions not applicable to other classes of actions. (*Id.*)
3. **EXERCISE OF POWER OF EMINENT DOMAIN—AGENCIES OF STATE—CONDITIONS.**—The persons, artificial or otherwise, upon whom the right to exercise or invoke on specified occasions the power of eminent domain is conferred by the state or the legislature, are mere *agents of the state* for that particular purpose, and the legislature, in conferring such right, has the authority to impose any reasonable conditions upon its exercise by them that it sees fit. (*Id.*)
4. **SPECIAL LAWS—POWER OF LEGISLATURE.**—It is competent for the legislature to pass laws which are designed to apply to or operate upon a certain class of persons only, but the class to which the law is solely to apply must be founded upon some natural, intrinsic, or constitutional distinction; and there must be no arbitrary discrimination between parties standing in the same relation to the subject of such laws. (*Id.*)

EMPLOYER AND EMPLOYEE. See Contract, 3, 4; Negligence, 1, 2, 6-11.

EQUITY. See Injunction; Receiver; Specific Performance; Trespass.

ESTATES OF DECEASED PERSONS. See Bank, 1-3; Fraud, 5, 6.

ESTOPPEL. See Appeal, 10; Criminal Law, 131; Judgment, 1-4.

EVIDENCE. See Appeal, 12; Bona Fide Purchaser, 1; Contract, 1, 2; Criminal Law, 2, 6, 15, 17-22, 25, 27-40, 43-45, 48, 50-52, 55-58, 65, 71, 74-79, 86, 87, 89, 90, 94, 100-121, 130, 132; Damages; Divorce, 3, 8, 10, 11; Fraud, 3; Fraudulent Conveyance, 1, 2, 4; Negligence, 4, 6, 9, 13, 17, 18; New Trial, 3, 4, 10; Sale, 2, 5, 9, 16, 22, 23, 25, 29-32, 34-37; Trust; Vendor and Vendee, 5, 6.

EXECUTION. See Appeal, 1-3.

EXTREME CRUELTY. See Divorce, 2, 3, 7-11.

FINDINGS. See Contract, 4; Judgment, 5; Vendor and Vendee, 3.

FIRE INSURANCE. See *Insurance*.

FORGERY. See *Criminal Law*, 55-63.

FRAUD.

1. **SALE OF CORPORATE STOCK—DAMAGES—UNWARRANTED JUDGMENT.**—In an action to recover damages alleged to have been suffered by reason of certain false and fraudulent representations concerning the value of certain shares of corporate stock, and the interest or dividends that such stock paid, whereby the plaintiff was induced to purchase the same from the defendant, a judgment in favor of the plaintiff, who resold the stock the day following its purchase, cannot be sustained, where the amount of the same is based upon the difference between the value that the plaintiff and his purchaser determined the stock to be worth under a compromise agreement made between them six years after the occurrence of the transaction, and the price paid to plaintiff by such purchaser for the stock. (*Glindemann v. Ehrenpfort*, 87.)
2. **MEASURE OF DAMAGES.**—In such an action the measure of damages is the difference between the value of the stock at the time of its sale by the defendant to the plaintiff and what it was then actually worth. (*Id.*)
3. **EVIDENCE—VALUE OF STOCK—DIVIDENDS.**—While the payment of dividends and the amount thereof are elements affecting the value of corporate stock, it by no means follows that such stock has no value because of the failure to pay dividends thereon. (*Id.*)
4. **PLEADING—DISCOVERY OF FRAUD—INSUFFICIENT COMPLAINT—STATUTE OF LIMITATIONS.**—A complaint in an action for damages for fraud in the procurement of a sale of corporate stock, filed six years and four months after the alleged fraud, which contains no facts showing why the same was not sooner discovered, but which simply recites that the fraud was not known or discovered until about a certain date, is insufficient. (*Id.*)
5. **ACTION TO SET ASIDE DECREE OF DISTRIBUTION—PRIOR PROCEEDING FOR LETTERS—RES ADJUDICATA.**—A decree denying an application for letters of administration upon an estate which had been finally settled and the property distributed, based upon the ground that the court by false testimony was deceived as to the character of the distributed property, is *res adjudicata* as to a subsequent action brought by the applicant for letters to set aside and vacate the decree of distribution upon the same ground. (*O'Brien v. Beardon*, 703.)
6. **CHARACTER OF PROPERTY—SUFFICIENCY OF EVIDENCE.**—In this action to vacate a decree of distribution on the ground that fraud was committed upon the court as to the character of the distributed property, it is held that the evidence warranted the conclusion that

FRAUD (Continued).

the property claimed by the plaintiffs to be the separate property of the deceased was in fact the community property of the deceased and her husband. (Id.)

7. **CONTRACT—SALE OF CORPORATION STOCK — AUTHORITY OF AGENT.**—Where one securing a purchaser for stock of a corporation represents the corporation in so doing, it must be assumed that he possesses all the usual and ordinary authority of such a sales agent, and actionable misrepresentations made by such agent in the sale are chargeable to the corporation, and a recovery against the corporation therefor may be had. (*Dox v. R. E. Lomax Co.*, 718.)
8. **RIGHT TO RECOVER PURCHASE PRICE OF STOCK.**—Where the agent of a corporation in the sale of its stock falsely represented that the corporation was doing a profitable business and earning a profit of not less than ten per cent on invested capital, and that during the whole period of its existence a dividend of ten per cent had been paid, which representations were relied upon by the purchaser, whereas, in truth the corporation at that time was not earning profits, but was insolvent, the purchaser may maintain an action for the recovery of the purchase money. (Id.)
9. **RIGHTS OF CREDITORS.**—Creditors of the corporation whom the records do not show became creditors subsequent to the sale are not injured by a judgment in favor of the purchaser for the recovery of the purchase money, and cannot complain. (Id.)

See Fraudulent Conveyance.

FRAUDULENT CONVEYANCE.

1. **QUIETING TITLE—EVIDENCE—SUPPORT OF FINDING.**—In this action to quiet title involving the validity of a deed of real property made by a husband to his wife, it is held that the evidence supports the findings that the husband, and not the wife, was the legal owner of the property at the time the deed thereof was made, and that such deed was void as to creditors of the husband because of lack of consideration and the insolvency of the grantor at the time of its execution. (*Wills v. E. K. Wood Lumber & Mill Co.*, 97.)
2. **CONSTRUCTION OF SECTION 3442, CIVIL CODE—PROOF OF FRAUD—WHEN NECESSARY.**—Section 3442 of the Civil Code makes a transfer fraudulent and void as to existing creditors, as a matter of law, when the transfer is voluntary or without a valuable consideration, by one while insolvent, or in contemplation of insolvency, and no proof of actual fraud is necessary. (Id.)
3. **ACTION BY JUDGMENT CREDITOR—INTENT OF PARTIES—DUTY OF COURT.**—In an action by a judgment creditor to set aside a conveyance of real property on the ground of fraud, the trial court is required in making up its conclusions to take into consideration all of the circumstances surrounding the transaction and determine from

FRAUDULENT CONVEYANCE (Continued).

them as to what the intent of the parties really was. (*Hilborn v. Soale*, 309.)

4. **ACTION TO SET ASIDE DEED—FRAUD—SUFFICIENCY OF EVIDENCE.**—In this action by a judgment creditor of a husband to have a deed of real property executed by the husband to his wife declared void as having been made without consideration and for the purpose of preventing the satisfaction of plaintiff's judgment, it is held that the evidence supports the finding that at the time the judgment was obtained the husband held a joint tenant's interest in the property, which he had acquired by gift from his wife, and that therefore there could be no return gift made by him to her which would have the effect of defeating the claims of his creditors. (Id.)
5. **PLEADING—CAPACITY OF PLAINTIFF.**—In such an action it is not necessary to set out in the complaint the history of the litigation or an abstract of the pleadings of the action in which the judgment was obtained. The only material thing to show is that plaintiff is a judgment creditor. (Id.)

GARNISHMENT.

1. **ACTION UPON CHECK—GARNISHMENT OF DEFENDANT IN ANOTHER ACTION—ERRONEOUS STAY OF PROCEEDINGS.**—An order staying proceedings in an action brought by the assignee of a dishonored check against the maker thereof until another action pending in the same court against the payee of the check was finally determined, is erroneous, where such order was based upon a notice of garnishment in the latter action served upon the defendant in the former action, which did not in any way pretend to describe or identify such check, but only gave notice of attachment of all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendant in the latter action in the possession or under the control of the defendant in the former action. (*American Exchange National Bank of Duluth v. Superior Court*, 8.)
2. **GARNISHMENT OF DRAWER IN DIFFERENT ACTION—STAY OF PROCEEDINGS UNWARRANTED.**—Such an order cannot be supported for the reason that it is shown by the answer that another attachment in a different case against such payee was issued and garnishment notice therein served on the defendant herein and also on the drawee of the check, and that the refusal of the latter to honor and pay the check was solely on account of such notice of garnishment. (Id.)
3. **GARNISHMENT OF CHECK AFTER DELIVERY.**—By agreement a check may be taken as absolute payment, and the drawer will then be liable only as an indorser, and not on the original debt; and a

GARNISHMENT (Continued).

check is always so far payment until dishonored that, after its delivery, the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check is given. (Id.)

4. **LIMITATION OF GARNISHEE'S LIABILITY.**—A garnishee's liability in the case of a debt due from him is grounded upon and is limited by his liability to the defendant in the principal action whereby the latter has at the time of the garnishment a cause of action, present or future, against him. (Id.)

GIFT.

1. **PURCHASE OF PIANO FOR CHILD.**—Where a stepdaughter, living with her mother and stepfather in every respect as a daughter, entered into a written contract for the purchase of a piano and gave in part payment of the purchase price an old piano, bought by the mother many years before, but paid for by the stepfather, which latter piano was purchased to be used by the daughter, and the balance of the purchase price of the new piano, which was payable in installments, was paid either by the daughter, her mother, or the stepfather, from moneys earned by the latter, the piano being purchased for the exclusive use of the daughter and being constantly referred to by the members of the family as her piano, and being delivered to her personally at the residence of her mother and stepfather, all that was done with reference to the purchase of the first piano and its exchange and the purchase of the second one being with the knowledge and consent of the stepfather, under the circumstances the stepfather intended to make a gift of the new piano to the stepdaughter, and the delivery, although not formal, was sufficient to constitute a valid gift. (Wiley B. Allen Co. v. Edwards, 184.)
2. **DELIVERY—WHAT CONSTITUTES.**—While in the case of one's child the necessity of a delivery is not dispensed with in order to constitute a gift, the formal ceremony of a delivery is not absolutely necessary, but it is sufficient if it appears that the donor intended an actual gift at the time, and evidenced his intention by some act which may be fairly construed into a delivery. (Id.)
3. **ACTION TO RECOVER AUTOMOBILE—ALLEGED GIFT—CONFLICTING EVIDENCE—FINDINGS CONCLUSIVE.**—In an action to recover possession of an automobile, claimed to have been given plaintiff by her husband, since deceased, where the evidence is conflicting, but there is substantial evidence tending to support the findings of the trial court, its decision cannot be disturbed on appeal. (Crofford v. Crofford, 662.)
4. **HUSBAND AND WIFE—UNDUE INFLUENCE—PRESUMPTION.**—Upon a gift from a husband to his wife, undue influence of the wife over the husband is not presumed from the mere relation of husband and wife. (Id.)

GRANTOR AND GRANTEE. See Deed; Fraudulent Conveyance.

GUARANTY. See Assignment; Contract, 8, 9; Corporation, 5.

HABEAS CORPUS.

QUESTION INVOLVED—JURISDICTION.—The sole ultimate question which is involved in a proceeding on *habeas corpus* is one merely of jurisdiction—that is, whether the order or the judgment or the adjudication or the process whose validity is thus attacked and questioned was one coming within the lawful authority or jurisdiction of the judge or the court or other legally constituted tribunal making, granting, or issuing it. (Matter of O'Connor, 225.)

HUSBAND AND WIFE. See Adverse Possession, 1; Criminal Law, 14, 15, 17, 18; Deed, 3-5; Divorce; Fraudulent Conveyance, 1; Gift, 4; Trust.

INITIATIVE AND REFERENDUM. See Election.

INJUNCTION. See Partition Wall; Trespass.

INSANE PERSONS.

1. **COMMITMENT OF INSANE PERSON—REGULARITY OF PROCEEDINGS—PRESUMPTION.**—In a collateral attack by *habeas corpus* proceedings upon the validity of an order committing a person to a hospital for the insane, where the court has jurisdiction of the subject matter and of the petitioner, it must be assumed, in the absence of a contrary showing appearing upon the face of the judgment-roll, that the proceedings leading to the judgment or order of commitment were in all respects regular or had in accordance with the vital requirements of the statute authorizing the commitment. (Matter of O'Connor, 225.)
2. **COMMITMENT FOR INEBRIETY—TIME OF HEARING.**—In a proceeding for the commitment to an insane hospital of a person charged with dipsomania or inebriety, it is not an abuse of discretion to set the time for the hearing and examination a few hours after the accused was brought before the judge, where it is shown that he was then informed as to all the rights guaranteed him under the statute. (Id.)
3. **PRODUCTION AND EXAMINATION OF WITNESSES—"REASONABLE OPPORTUNITY"—CONSTRUCTION OF SECTION 2185c POLITICAL CODE.**—The "reasonable opportunity" to produce and examine witnesses which the statute contemplates shall be given a person charged and examined under section 2185c of the Political Code is a matter which must be determined by the circumstances of each particular case, and thus the matter is one whose determination rests in the

INSANE PERSONS (Continued).

sound discretion of the judge before whom the charge is pending and heard. (Id.)

4. **OMISSION TO PROVIDE FOR JURY TRIAL—CONSTITUTIONALITY OF SECTION 21850, POLITICAL CODE.**—One accused of inebriety is not entitled as of right to a jury trial, and section 21850 of the Political Code is not unconstitutional because it omits to provide for such a trial in cases arising under its provisions. (Id.)
5. **TRIAL BY JURY—CONSTITUTIONAL LAW.**—The right of trial by jury secured by the constitution is the right to a jury trial as it existed and was recognized at common law. (Id.)

INSOLVENCY. See Bankruptcy.

INSTRUCTIONS. See Criminal Law, 7, 23, 29, 39, 41, 53, 59, 79, 85, 93, 95, 98, 100-105, 115-119, 122, 125-127; Negligence, 2, 7.

INSURANCE.

1. **FIRE INSURANCE—TIME OF PAYMENT—DENIAL OF LIABILITY—PROVISION OF POLICY NOT WAIVED.**—A provision in a policy of fire insurance that the loss should not become due and payable until a certain time had elapsed after presentation of the proofs of loss, is not waived by reason of the denial of any liability upon the policy by the insurance company at the time of the presentation of the proofs of loss by the insured. (*Borger v. Connecticut Fire Ins. Co.*, 476.)
2. **ACTION ON INSURANCE POLICY—PREMATURE ACTION.**—It is held in this action upon a policy of insurance that the judgment and order appealed from should be reversed upon the authority of *Borger v. Connecticut Fire Ins. Co.*, 24 Cal. App. 696, and *Irwin v. Insurance Co. of North America*, 16 Cal. App. 143. (*Lagudis v. London Assur. Corp.*, 482.)

See Criminal Law, 26-34; Mutual Benefit Association.

INTOXICATING LIQUORS. See Criminal Law, 64-70; Sale, 19-21.

JUDGE.

1. **DISQUALIFICATION OF JUDGE—DISCLOSURE DURING TRIAL—TIMELY OBJECTION.**—Where there is nothing on the face of the record in advance of the trial of an action to show that the judge was disqualified from trying the same, and such disqualification is first disclosed upon the cross-examination of the plaintiff, a motion thereupon made to change the place of trial is not too late. (*Lynip v. Alturas School District of Modoc County*, 158.)
2. **ACTION BY BANKING CORPORATION—RELATIONSHIP OF JUDGE TO DIRECTOR—DISQUALIFICATION TO ACT.**—A judge is disqualified from sitting or acting in an action in which a bank is the real party in

JUDGE (Continued).

interest, where his brother is a director of the bank, notwithstanding the fact that the action is brought in the name of a private individual. (Id.)

3. **CORPORATE CHARACTER OF BANK—TIME OF OBJECTION.**—Where, in such a proceeding, it is intended to question the corporate character of the bank, such objection should be made at the time of the motion for change of place of trial, and when not so made the corporate character will be assumed. (Id.)
4. **STATUS OF DIRECTOR OF CORPORATION—OFFICER.**—A director of a corporation is an officer within the meaning of subdivision 2 of section 170 of the Code of Civil Procedure, which provides that a judge is disqualified from sitting or acting in any action or proceedings where he is related to an officer of a corporation within the third degree, computed according to rules of law. (Id.)

JUDGMENT.

1. **QUIETING TITLE—PORTION OF MINING CLAIM—FORMER JUDGMENT—LACK OF ESTOPPEL—DIFFERENT SUBJECT MATTER.**—The plaintiff in an action involving the title and right of possession of two town lots forming a part or portion of a lode mining claim, of which the defendant was the owner, is not estopped by a judgment obtained by the defendant against the plaintiff in a previous action in ejectment to recover the possession of certain specific property situated within the exterior boundaries of the claim, where it appears from the pleadings and from the judgment that such action involved solely the question of the right to the possession of another and different portion or part of the claim. (*Purcell v. Victor Power & Mining Co.*, 504.)
2. **ESTOPPEL BY JUDGMENT.**—The force of an estoppel by judgment resides in the judgment itself, and not in the finding of the court or the verdict of the jury. (Id.)
3. **RES ADJUDICATA.**—In order that a former judgment be a bar to future proceedings, it must appear that such judgment necessarily involved the determination of the same fact to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit, but it must appear to have been precisely determined. (Id.)
4. **ACQUISITION OF TITLE AFTER ISSUE JOINED—JUDGMENT NOT A BAR.** The plaintiff in an action involving the title and right of possession of a fractional portion of a mining claim is not estopped by a former judgment in an action in ejectment involving a different part of the claim, by reason of the fact that the plaintiff did not acquire title to the property in the present action until one year after issue had been joined in the first action, where such fact was not set up by supplemental answer therein. (Id.)

JUDGMENT (Continued).

5. VALIDITY OF.—Where, prior to the making of findings, a judgment was entered in favor of the plaintiff, but thereafter findings were made, and a second judgment regularly entered, the second judgment is the only one that can be considered, and the first will be assumed to have been vacated. (*Hulbert v. All Night and Day Bank*, 765.)

6. DEFAULT JUDGMENT—ORDER SETTING ASIDE—CONFLICTING EVIDENCE—DISCRETION OF COURT.—On an appeal from an order setting aside a default judgment, where it appears that the order was based upon conflicting evidence, it will not be disturbed, as it was for the trial court to say which showing it would accept as the truth; and where it may be fairly inferred from the showing made by the defendant that his default was induced primarily by the conversations, conduct, and promises of the agent of the plaintiff, it cannot be said that the lower court abused its discretion in making the order complained of. (*Rossi v. Ghiotto*, 550.)

See Appeal, 1-6, 19; Bankruptcy; Claim and Delivery, 2-6; Costs, 2; Divorce, 1, 2, 14, 15; Ejectment, 4; Fraud, 1; Justice's Court, 4, 5, 9, 10; Partition; Practice, 1, 7; Sale, 13; Specific Performance.

JURISDICTION. See Corporation, 3; County, 2; Criminal Law, 9; Habeas Corpus; Justice's Court, 7.

JURY AND JURORS. See Criminal Law, 1, 25-37; Insane Persons, 4, 5.

JUSTICE'S COURT.

1. DISMISSAL OF ACTION—NONJUSTIFICATION OF SURETIES—FILING OF NEW UNDERTAKING.—Under the latter portion of section 978a of the Code of Civil Procedure, it is the duty of the appellant, after exception taken to the sufficiency of the sureties upon the undertaking on a justice's court appeal, to cause such sureties, or others in their place, to justify after notice and within the time specified in the statute, and where, instead of doing so, an appellant files a second undertaking within such time which has for its purpose the supplying of an inadvertent omission of the word "house" in the expression "is a householder," in the part of the undertaking referring to the qualification of the sureties, no jurisdiction is acquired of the appeal. (*Martha Washington Council No. 2, Daughters of Liberty of the State of California v. Superior Court*, 45.)

2. APPEAL—TIME FOR FILING UNDERTAKING.—Under section 978a of the Code of Civil Procedure, as amended in 1909, the time for filing an undertaking on appeal from a justice's court begins to run from the date of the filing of the notice of appeal, and not from the date of the service of such notice, and the filing of a notice of

JUSTICE'S COURT (Continued).

appeal and undertaking on the same day is a compliance with the statute, notwithstanding notice of the appeal was served seven days before it was filed. (*Judd v. Superior Court of Humboldt County*, 671.)

3. **SUFFICIENCY OF UNDERTAKING.**—Where the form of an undertaking on appeal constitutes a bond on appeal as well as an undertaking to stay execution, if the undertaking is sufficient as an appeal bond, jurisdiction of the appeal is acquired, regardless of the sufficiency of the bond to stay execution. (*Id.*)
4. **UNDERTAKING—INCORRECT RECITAL OF JUDGMENT.**—An incorrect recital of the date of the rendition of judgment in the undertaking accompanying the notice of appeal does not invalidate the undertaking nor affect the jurisdiction of the appeal. (*Id.*)
5. **NOTICE OF APPEAL—INCORRECT RECITAL OF JUDGMENT.**—An incorrect recital in a notice of appeal of the date of the rendition of the judgment does not render the notice invalid where the judgment is otherwise correctly described. (*Id.*)
6. **JUSTIFICATION OF SURETIES—SUBSTITUTION OF NEW SURETIES.**—Where the sureties on an undertaking on appeal are required to justify, there is no objection to the substitution for a surety who fails to appear of a new surety who signs the same bond and justifies, where the names of the original sureties are not inserted in the body of the instrument. (*Id.*)
7. **JURISDICTION—VACATING JUDGMENT BY DEFAULT—CERTIORARI.**—A justice's court has no jurisdiction to set aside a judgment by default, basing its order upon evidence other than the docket and the papers on file, and an order thus made will be annulled on *certiorari*. (*Roberts v. Justice's Court of Los Angeles Township*, 768.)
8. **SUMMONS—FAILURE TO SERVE AND RETURN WITHIN THREE YEARS.**—A justice's court is not deprived of jurisdiction because of the failure to make service of summons and return within three years from the commencement of the action. (*Id.*)
9. **DEFAULT JUDGMENT—SERVICE OF SUMMONS OUTSIDE COUNTY—RECORD—SILENCE AS TO RESIDENCE OF DEFENDANT—JUDGMENT NOT VOID ON FACE.**—A justice's court judgment is not void on its face because of the absence of any affirmative statement therein, or in the return of summons, that the defendant resided in the county in which he was served, or that at the time of the commencement of the action he was a resident of the county in which the action was brought, where it appears from the allegations of the complaint that the written order upon which the action was based was entered into and to be performed in the county in which the action was brought. (*Id.*)
10. **IMPROPER SERVICE OF SUMMONS—SETTING ASIDE JUDGMENT—BURDEN OF PROOF.**—Upon a motion to set aside a judgment rendered

JUSTICE'S COURT (Continued).

by default upon a service of summons in violation of the provisions of subdivision 2 of section 843 of the Code of Civil Procedure, the burden of proof is upon the defendant to show that he was not a resident of the county in which he was served. (Id.)

See Criminal Law, 8, 9.

LANDLORD AND TENANT. See Lease.

LARCENY. See Criminal Law, 80-82.

LASCIVIOUS ACT. See Criminal Law, 71-73.

LEASE.

1. **BREACH OF LEASE OF OIL LANDS—REMOVAL OF CASING FROM WELL—MEASURE OF DAMAGES.**—In an action by a lessor against the stockholders of a corporation for damages for the wrongful removal by the corporation of a quantity of casing from an oil well drilled by it on the lands of the lessor, the correct measure of the plaintiff's damages is not the amount which it would cost to replace the well in the same condition it was in at the time of removal, but simply the value of the casing when removed from the well, where it is shown that the land was barren and desert land and valuable only if it contained oil, and that no oil had been discovered therein. (Johnson v. Hinkel, 78.)
2. **BREACH OF CONTRACT—MEASURE OF DAMAGE.**—Courts will not, except where exemplary damages are given, allow a party to a contract to recover upon its breach more than he would have received by its due performance. (Id.)
3. **LEASE OF OIL LANDS—NONREMOVAL OF CASING UPON ABANDONMENT—COVENANT NOT VIOLATIVE OF ACT OF 1903.**—A provision in a lease of land for the purpose of exploring for and developing oil thereon, that the lessee should not remove the casing therefrom or plug any wells without the written consent of the lessor, does not make the lease void as violative of the act to prevent injury to oil or petroleum bearing strata by the infiltration or intrusion of water therein (Stats. 1903, p. 399), and which requires that upon the abandonment of any oil well, it shall be the duty of the owner to withdraw the casing therefrom and fill up the well. (Id.)
4. **MAINTENANCE OF ACTION BY LESSOR—WITHDRAWAL OF LAND FROM ENTRY—PRIOR RIGHTS NOT AFFECTED BY.**—The right of the lessor to maintain an action for damages against the lessee of oil lands for a breach of the terms of the lease is not affected by a Presidential proclamation withdrawing such lands from entry, where at the time of breach the plaintiff was in lawful possession of the land as a locator under the mining laws of the United States. (Id.)

LEASE (Continued).

5. AGREEMENT FOR QUIET POSSESSION—ACTION TO QUIET TITLE—ABANDONMENT OF POSSESSION—ACTION FOR DAMAGES.—Where a lease of land for the development of oil provided that the lessor should protect the lessee against the claim of any party in any contest arising over the ownership, this provision shows that the lessee did not rely upon any implied covenant for quiet possession, and the latter was not justified in vacating the property because suit was brought by a third party to quiet title, and in an action for damages against the lessor to assert the claim that he was evicted thereby,—it not being shown that plaintiff's possession was the subject of a direct attack or interference, and there being no showing of any breach of the express agreement to protect the plaintiff against claims of ownership. (*Commins v. Guaranty Oil Co.*, 189.)

See Adverse Possession, 4; Corporation, 2; Partition.

LIEN. See Bankruptcy; Mechanics' Liens; Street Assessment.

LOS ANGELES, COUNTY OF. See Office and Officers, 4-8.

LOTTERY TICKET. See Criminal Law, 80-84.

MANDAMUS.

WHEN ISSUABLE.—A writ of mandate will not issue if there is a plain, speedy, and adequate remedy at law. (*White v. Mathews*, 684.)

See Criminal Law, 12.

MARRIED WOMEN. See Husband and Wife.

MASTER AND SERVANT. See Employer and Employee.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

ACTION FOR FORECLOSURE—PURCHASE BY AGENT OF DEFENDANT—SUFFICIENCY OF EVIDENCE.—In this action for the foreclosure of a lien for materials furnished by the plaintiff for use in the construction of a barn on real property owned by the defendant, the court was warranted in finding that the son of the defendant, in the transaction with the plaintiff, was acting for and as the agent, either actual or ostensible, of the defendant. (*Grenfell Lumber Co. v. Peck*, 847.)

MINOR. See Criminal Law, 42-45; Parent and Child.

MORTGAGE. See Claim and Delivery, 1-3; Deed, 4, 8.

MUNICIPAL CORPORATIONS. See County; Election, 2-6; Street Assessment.

MURDER AND MANSLAUGHTER. See Criminal Law, 92-122.

MUTUAL BENEFIT ASSOCIATION.

1. **BENEFICIARY—RIGHT OF INSURED TO CHANGE.**—In the absence of restrictive provisions of the charter, by-laws, or rules under which the association operates, a member of a mutual benefit association has the right to revoke his designation of a beneficiary and substitute a different one. (*Vawter v. Purdy*, 623.)
2. **RIGHT TO SELECT STRANGER AS BENEFICIARY.**—Where a mutual benefit association is unincorporated and has no by-laws or set of rules beyond those which are set forth in the circular issued to invite members, which is accompanied by an application blank to be signed by the applicant, and the only qualification required is that the applicant shall be a member in good standing of a certain fraternal order, and shall not be over sixty years of age and in good health, the fund is designated as the "widow's benefit fund," and the circular informs the prospective members that the protection will be extended to either "wife, children, mother, sister, or friend," a member has the right to designate as the beneficiary one who does not stand in blood relationship to him. (*Id.*)
3. **LIFE INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—DIFFERENCE IN—RIGHT TO CHANGE BENEFICIARY.**—While, under what may be termed ordinary life insurance policies, no right to change the beneficiary exists, the legal relation of a member of a mutual benefit association is different, and with respect to the benefits to accrue in the latter organization, the beneficiaries are possessed of but an expectancy, as against vested interests which accrue under the ordinary life policies. (*Id.*)

NEGLIGENCE.

1. **INJURIES TO DRIVER OF DELIVERY WAGON—EXPLOSION OF AMMONIA—PROXIMATE CAUSE OF INJURY—PLEADINGS AND EVIDENCE—FAILURE TO FASTEN CORK.**—In this action for personal injuries received by the driver of a delivery wagon from burns caused by the popping out of the cork from a demijohn of concentrated ammonia which he was engaged in delivering, it is held that, in view of the admissions of the answer and the testimony of the plaintiff—who alone was able to describe the accident and the circumstances surrounding it—the jury were warranted in the implied findings that the defendant was guilty of negligence in sending out the demijohn without securing the cork by seal, wire, or other means, and that the plaintiff was not guilty of contributory negligence in the way he loaded or drove his wagon, or in the matter

NEGLIGENCE (Continued).

of the handling of the demijohn after it had been placed therein. (Congdon v. California Drug & Chemical Co., 200.)

2. **MINORITY OF PLAINTIFF—ELEMENT AFFECTING RESPONSIBILITY—INSTRUCTIONS.**—In such an action the minority of the plaintiff should not be presented to the jury as an element affecting his responsibility, when the nature of his employment, his intelligence, and his experience in the kind of work he was doing is taken into consideration, but instructions to such effect are not prejudicially erroneous where the jury is also instructed that notwithstanding such minority, the plaintiff's conduct was to be judged by "the knowledge, experience, and judgment that he possessed." (Id.)
3. **PHYSICIAN AND SURGEON—DEGREE OF SKILL—IMPLIED CONTRACT.**—A physician or surgeon undertaking the treatment of a patient impliedly contracts not only that he possesses that reasonable degree of learning and skill possessed by others of his profession, but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and if he possesses such reasonable degree of learning and in the treatment of the patient exercises ordinary care and skill in applying it, he is not liable for the results that follow. (Houghton v. Dickson, 321.)
4. **NEGLECTED SURGICAL TREATMENT—INSUFFICIENCY OF EVIDENCE.**—In this action against a physician and surgeon to recover damages alleged to have been sustained by the plaintiff as the result of negligent surgical treatment of the plaintiff's arm, it is held that the evidence wholly fails to show any lack of care and skill on the part of the defendant in setting and treating the fractured bone of the arm, and that it likewise fails to show when the dislocation of the elbow occurred, or that a physician in the exercise of ordinary care and skill in treating the plaintiff should have discovered the dislocation and treated the same. (Id.)
5. **EXERCISE OF REASONABLE SKILL—QUESTION FOR JURY.**—A surgeon does not undertake to perform a cure, nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes a fair, reasonable, and competent degree of skill, and in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to a want of a proper degree of skill and care in the defendant or not. (Id.)
6. **DEATH OF TELEPHONE LINEMAN—CONTACT WITH POWER LINE—SUFFICIENCY OF EVIDENCE.**—In this action to recover damages for the death of the minor son of plaintiff while in the employ of the defendant in the capacity of a general telephone lineman, which death occurred while he was engaged in fastening a bracket of the defendant upon one of its poles for the purpose of stringing

NEGLECTANCE (Continued).

and making fast to such bracket a wire, and as the result of his coming in contact with an electric power wire of another company which was alleged to have been strung less than four feet from where the bracket was being attached, it is held that there was sufficient evidence to justify the jury in finding that the defendant was culpably negligent in directing the deceased to work in a place known to the defendant to be dangerous, without specially warning him of the danger and providing for his protection. (*Bloxham v. Tehama County Telephone Co.*, 326.)

7. **STATUTE REGULATING ELECTRIC WIRES—VIOLATION BY DEFENDANT—CONCLUSIVE PRESUMPTION AGAINST CONTRIBUTORY NEGLIGENCE—PROPER INSTRUCTION.**—An instruction that if the jury found that the defendant was, in the erecting and constructing of the telephone line upon which the deceased was working at the time of his death, violating the act of April 12, 1911 (Stats. 1911, p. 1037), which prohibits the erection and maintenance above ground of any wire or cable conveying or carrying less than six hundred volts of electricity within a distance of four feet from any wire or cable which shall conduct or carry at any one time more than six hundred volts of electricity, and that if they further found that such violation of such statute contributed to the death of deceased, the law conclusively presumes that said deceased was not guilty of contributory negligence, is not erroneous. (Id.)
8. **CONSTITUTIONAL LAW—ACT REGULATING ERECTION OF POWER LINES.** The act of April 22, 1911 (Stats. 1911, p. 1037), regulating the placing, erection, use, and maintenance of electric poles, wires, cables, and appliances, and providing the punishment for the violation thereof, applies to a single class of individuals or objects, and is not unconstitutional as class legislation. (Id.)
9. **EVIDENCE—SAGGING OF POWER LINE—PROOF PROPERLY EXCLUDED.** In such an action it is not error to refuse evidence and instructions offered to shift the responsibility for the accident upon the power company in causing its line to sag, thus bringing it within the forbidden line of clearance, where it is shown that the power line was first erected. (Id.)
10. **PLEADING—PARITES—APPEAL—WAIVER.**—Upon an appeal from an order denying a new trial, in such action, the objection that the action should have been brought by the husband of the plaintiff cannot be considered, where the cause was tried on the pleadings as they stood without objection to the evidence in support thereof. (Id.)
11. **APPEAL—ORDER DENYING NEW TRIAL—WHAT REVIEWABLE.**—The sufficiency of the pleadings to support the judgment, or the sufficiency of the findings of fact to sustain the conclusions of law, cannot be considered on an appeal from an order denying a new trial. (Id.)

NEGLIGENCE (Continued).

12. **PERSONAL INJURIES—PATRON OF CONCESSION IN AMUSEMENT PARK—LIABILITY OF PARK OWNER.**—A corporation which conducts an amusement park and makes a charge for admission thereto is liable for personal injuries received by a patron of the park in a concession installed therein by private parties at their own expense and operated by them under contract with the corporation whereby the latter received a percentage of the gross admission fees thereto, notwithstanding the operators and attendants necessary to run the concession were hired and paid by the concessioners, and that the corporation had no control or direction over them, excepting the right reserved to object to any employee who was not conducting the business in a proper way. (*Whyte v. Idora Park Co.*, 342.)
13. **ACTION FOR DAMAGES — DEFECTIVE EXIT DEVICE — SUFFICIENCY OF EVIDENCE.**—In this action against an amusement park corporation to recover damages for personal injuries received in a concession, it is held that even if it were the rule that such a corporation is liable to a patron only where the injury is the result of defective construction, or where the device is of a character which in operation is likely to cause injury, the judgment in the action could not be reversed because there is evidence in the record which supports the finding of the court that the slideway which it was necessary to go upon in making the exit from the concession in question and from which the injury occurred was built at such a steep angle and with the bottom thereof so close to a wall of the building which inclosed the contrivance, that one using the slideway was very likely to be injured. (*Id.*)
14. **ASSUMPTION OF RISK—QUESTION FOR JURY.**—It is also held that under the pleadings and evidence it was for the jury to determine as to whether there was an assumption of risk on the part of the plaintiff, and that the finding thereon must be upheld. (*Id.*)
15. **PERSONAL INJURIES—PLEADING.**—While it is permissible to plead negligence in general terms, specifying the particular act or acts upon which the pleader relies as constituting such negligence, this rule applies only to cases where the acts as alleged might or might not have been negligently done, and has no necessary application to a case wherein the facts complained of and specifically set forth are such that the inference of negligence necessarily arises from their enumeration. (*Herriek v. Oakland Motor Co.*, 414.)
16. **COLLISION OF AUTOMOBILE AND MOTORCYCLE — SUFFICIENCY OF COMPLAINT.**—In an action for damages for injuries received in a collision between an automobile and a motorcycle, where the complaint alleges that plaintiff was riding southward along the westerly side of a certain avenue and near the southerly side of an intersecting street, where he had a right to be and to ride, and the defendants, operating an automobile, were proceeding northerly along the easterly side of the avenue, and suddenly, without warn-

NEGLIGENCE (Continued).

ing, altered the course of the automobile and drove it with high speed and without any warning or notice across said avenue to the westerly side thereof, near the southerly side of the street, where the plaintiff rightfully was, and there struck and injured him, the inference of negligence from the facts is logical and irresistible, and it was not necessary to aver that they were negligently done. (Id.)

17. **DESTRUCTION OF FEED BY FIRE—SUFFICIENCY OF EVIDENCE.**—In an action for damages alleged to have accrued to plaintiff by the destruction of several hundred acres of feed standing upon certain land caused by fire, which it is alleged started upon the lands of the defendant and was negligently permitted to spread to plaintiff's land, where the evidence as to the cause of the fire upon the lands of the plaintiff is in substantial conflict upon the question as to whether it originated from a lighted cigarette dropped upon the lands of the defendant by an employee, or resulted from the burning of grass upon the lands of the defendant for the purpose of clearing the same by a person who claimed to be acting as the agent of the corporation defendant, the findings of the trial court cannot be disturbed on appeal. (Sample v. Round Mountain Citrus Farm Co., 547.)

18. **AUTHORITY OF AGENT—SUFFICIENCY OF EVIDENCE.**—In such a case, whether a person who acknowledged responsibility for the origin of the fire upon the lands of the corporation defendant was or was not the agent of the defendant was a matter peculiarly within its own knowledge, and the fact that such person was found upon the lands of the defendant at or about the time of the starting of the fire, openly acting in the capacity of superintendent over the defendant's land and the work being done thereon, was a circumstance which carried with it the implication of authority to so act from the corporation defendant, and sufficed to make a *prima facie* showing of the existence of the relation of principal and agent between the corporation defendant and such person, which, in the absence of a showing to the contrary, was sufficient to support a finding of the trial court that such relation did exist at the time of the fire. (Id.)

19. **ADMISSIONS OF AGENT—ADMISSIBILITY OF.**—In such a case statements of the person who had charge of the defendant's lands at the time of the fire, concerning its origin, and his subsequent offer to settle for the damages resulting therefrom to the plaintiff's lands, were admissible in evidence. (Id.)

NEGOTIABLE INSTRUMENT. See Promissory Note.

NEW TRIAL.

1. **BILL OF EXCEPTIONS—DELAY IN SETTLEMENT—IMPROPER REFUSAL TO SETTLE.**—The trial court was not justified in refusing to set-

NEW TRIAL (Continued).

the a proposed bill of exceptions, upon the ground of the laches of the party proposing it, where, upon the hearing of the settlement, the judge, after the matter had proceeded for some time, requested counsel for both sides to confer and attempt to agree on certain of the proposed amendments, and to report to him as to what could not be agreed upon, and the further hearing of the matter was continued for such report to be made, four months thereafter elapsing, during which time some ineffectual efforts were made by the parties to come to an agreement, failing in which the proponents caused the matter of the settlement of the bill to be again placed on the calendar of the court, and the bill together with the amendments having in the meantime remained in the possession of the adverse party. (*Slye v. Hunt*, 117.)

2. **CHANGE OF LAW AS TO PROCEDURE—APPLICABILITY OF TO PENDING CASES—USE OF BILL OF EXCEPTIONS UPON APPEAL FROM JUDGMENT.** The change in the law governing new trials and appeals and taking away the right of an independent appeal from an order denying a motion for a new trial, and substituting a provision which permits the appellants upon their appeal from the judgment to have reviewed the errors, if any, of the trial court in denying their motion for a new trial, applies to cases pending and conditions existing at the time the statute took effect where no substantial remedies are impaired; and in such a case the appellants were entitled to have the bill of exceptions settled for use on their appeal from the judgment. (*Id.*)
3. **NEWLY DISCOVERED EVIDENCE—REQUIREMENTS OF AFFIDAVIT.**—In support of a motion for a new trial on the ground of newly discovered evidence, it is incumbent on the moving party to show the diligence employed in preparing for the first trial, how the alleged new evidence was discovered, and why it was not discovered before the first trial, and such other facts as will make it clear to the court that the failure to produce the alleged newly discovered evidence and present it at the first trial of the case was not attributable to the fault or want of diligence of the party, and where the affidavit fails to show these things, it is insufficient. (*Foster v. National Ice Cream Co.*, 484.)
4. **MOTION FOR NEW TRIAL—CONFLICTING EVIDENCE.**—The weight of conflicting evidence will not be considered on an appeal from an order granting or refusing a new trial. (*Crofford v. Crofford*, 662.)
5. **MOTION FOR NEW TRIAL—AFFIDAVITS—FAILURE TO SERVE IN TIME.** Affidavits of newly discovered evidence cannot be considered on a motion for a new trial where they were not served until more than ten days after the service and filing of the notice of intention to move for a new trial, and no extension of time therefor having been granted. (*Id.*)



NEW TRIAL (Continued).

6. **MOTION FOR NEW TRIAL—DISCRETION OF COURT.**—It is within the discretion of the trial court to determine that facts stated in affidavits of newly discovered evidence were not sufficient to warrant granting of a new trial, and its decision will not be disturbed on appeal where the circumstances are such as in the case at bar. (Id.)
7. **APPEAL—DISCRETION OF TRIAL COURT.**—An order granting a new trial will not be disturbed upon appeal save upon a showing of an abuse of the discretion vested in the trial court. (*Meinberg v. Jordan*, 760.)
8. **AFFIRMANCE OF ORDER—MOTION UPON SEVERAL GROUNDS.**—An order granting a new trial must be affirmed without regard to the ground upon which it is specifically based if it could be rightfully granted upon any of the grounds upon which the motion was made, subject, however, to the exception that in passing upon the correctness of the order the appellate court may not consider the insufficiency of the evidence when the lower court by direct language expressly excludes such ground as a basis for its order. (Id.)
9. **EXCESSIVE DAMAGES—IMPLICATION OF INSUFFICIENCY OF EVIDENCE.**—An order granting a new trial in an action for damages for personal injuries upon the sole ground that the damages awarded to the plaintiff are excessive does not fall within the exception to the rule, but implies that the motion was granted upon a consideration of the insufficiency of the evidence to support the verdict. (Id.)
10. **INSUFFICIENCY OF EVIDENCE—QUESTION FOR TRIAL COURT.**—Upon a motion for a new trial in an action for damages for personal injuries, the probative force and effect of the evidence as to the nature and the extent of the injuries, and the damages resulting therefrom, is for the determination of the trial court, notwithstanding there is no conflict in the evidence. (Id.)
11. **ACTION FOR PERSONAL INJURIES—ASSAULT AND BATTERY—EXCESSIVE DAMAGES—ORDER GRANTING NEW TRIAL—DISCRETION NOT ABUSED.**—In this action for damages for personal injuries sustained as the result of an assault and battery, it is held that no abuse of discretion was committed in granting the motion for a new trial on the sole ground that the verdict in the sum of \$750 was excessive. (Id.)

See Agency, 14, 15, 18; Criminal Law, 99, 100, 180;
Negligence, 10, 11; Practice, 2.

NONSUIT. See Practice, 1.

NOVATION.

1. **ORDER FOR PAYMENT OF MONEY—EVIDENCE—CONSTRUCTION OF INSTRUMENT.**—In this action to recover upon a written order calling for the payment of various sums of money upon different dates, which was drawn upon the defendant by a sales agent employed by it to make disposition of certain lands, and which was accepted by the plaintiff in payment of certain advances made by it to such agent to make such sales, it is held that, in the light of the evidence, the dates set after the several installments which were to be paid by the terms of the accepted order referred, not to the times when commissions would be due and payable to such agent from the defendant, but that they referred to the dates whereon the several sums set before them would be due and payable by the defendant to the plaintiff without respect to when or whether any particular amount of commissions was then earned or payable. (*Sprague Caning Machinery Co. v. Western Ranching Corp.*, 374.)
2. **EFFECT OF ORDER—NOVATION.**—It is also held that on the date of the drawing and acceptance of the order a novation was agreed to and accomplished between the parties thereto, and that whatever contingencies there might be as to the amount of commissions then or thereafter to be chargeable to the defendant as between itself and such agent, were assumed by the defendant, and were not to affect or qualify the terms of its said acceptance or the amounts to become due the plaintiff thereon. (*Id.*)

OFFICE AND OFFICERS.

1. **PROBATION OFFICERS—POWER OF APPOINTMENT—COUNTY CHARTER.**—Where a county charter adopted pursuant to the amendment of 1911 to section 7½ of article XI of the constitution authorizes the board of supervisors of the county to make provision for the appointment of probation officers, and provision is so made, the general laws of the state are superseded. (*Anderson v. Lewis*, 24.)
2. **ORDINANCE CREATING PROBATION OFFICES—SILENCE AS TO MANNER OF APPOINTMENT—GENERAL LAW APPLICABLE.**—Where, however, the board of supervisors, in enacting an ordinance providing for probation offices and fixing the compensation of the officers, makes no mention of the manner in which the appointments shall be made, the general laws of the state govern the matter. (*Id.*)
3. **ASSISTANT PROBATION OFFICER—INVALID APPOINTMENT.**—An assistant county probation officer appointed by the judge of the juvenile court instead of by the chief probation officer of the county is not a legally appointed officer, where such county had adopted a freeholders' charter and provided therein that its board of supervisors might make provision for the appointment of such officers, notwithstanding that such board, in enacting an ordinance providing for such officers, failed to make any mention of the manner of their appointment. (*Id.*)



OFFICE AND OFFICERS (Continued).

4. **ACTION TO COMPEL SHERIFF TO RETURN FEES TO COUNTY—PLEADING—SUFFICIENCY OF PETITION.**—In a proceeding for a writ of *mandamus* to compel the sheriff of Los Angeles County to pay into the county treasury all fees collected by him as such sheriff between certain dates, for the performance of official duties pertaining to that office, an allegation in the petition that the respondent as sheriff, between the dates specified, "collected and received and appropriated to his own use, the sum of \$3,000.00 as fees belonging to Los Angeles County for the performance of his services as sheriff of Los Angeles County during said time," is sufficient as against a general demurrer. (Keith v. Hammel, 181.)
5. **CONDUCT OF ACTION FOR COUNTY—CONTROL BY PUBLIC OFFICERS.**—The general effect of the provisions of the charter of Los Angeles County and of the statutes is, not only that the conduct of actions in which the county is a party is committed to the charge and control of public officers, but it is the intention (in harmony with long-established principles) that the county shall be a party to actions and proceedings wherein the county is concerned. (Id.)
6. **ACTION BY TAXPAYER—WHEN UNAUTHORIZED.**—A resident property owner and taxpayer in the county of Los Angeles has no right to maintain an action to compel the sheriff of the county to pay into the county treasury certain fees collected and alleged to have been wrongfully appropriated by him, in the absence of a showing that the proper county officers have refused to commence or prosecute such a proceeding for the protection of the county's interest. (Id.)
7. **SAN FRANCISCO CHARTER—MISCONDUCT OF FIRE COMMISSIONERS—REMOVAL OF CHIEF ENGINEER WITHOUT TRIAL—REMOVAL OF BOARD BY MAYOR.**—Under the provisions of section 2 of chapter 2 of article IX of the charter of the city and county of San Francisco, which declares that no officer, member, or employee of the fire department should be removed from office except for cause and after trial, the board of fire commissioners have no right to remove the chief engineer of the department without assigning a cause therefor and without trial, and where they do so after being so advised by the city attorney, and after being notified to desist by the mayor, their action affords sufficient ground for their removal from office. (Spader v. Rolph, 774.)
8. **VOID PROVISION OF CHARTER—EFFECT OF CONSTITUTIONAL AMENDMENT.**—While, at the time of the adoption of the charter of the city and county of San Francisco in the year 1900, the provision of section 2 of chapter 2 of article IX thereof was void by reason of its conflict with section 16 of article XX of the constitution, such void provision was effectively validated by the amendment of November 3, 1914, to section 8½ of article XI of the constitution, giving municipal corporations governed by charters the authority to provide for the tenure of office and removal of muni-

OFFICE AND OFFICERS (Continued).

cipal employees, and no change in such charter provision or enactment was necessary in order to give it effect. (*Id.*)

See County.

OPTION. See Broker, 1; Vendor and Vendee, 1.

PARDON. See Attorney at Law, 1, 2; Criminal Law, 12.

PARENT AND CHILD.

1. **CONVICTION FOR NONSUPPORT—PROOF OF ABILITY.**—In order to support a conviction of a parent for failure to support his minor children, it is essential that proof of his ability so to do be made, as inability without fault is a "lawful excuse," within the meaning of that phrase as used in section 270 of the Penal Code. (*People v. Forester*, 460.)

2. **INABILITY TO SUPPORT—EVIDENCE—BUSINESS REVERSES AND PERSONAL INJURY.**—Inability due in part to an injury to the hand of a skilled dentist and in part to business reverses, without any ground for inference that his financial embarrassment was the result of artifice or any design to deprive his children of support, is a sufficient showing of lawful excuse for failure to discharge such parental duty. (*Id.*)

See Criminal Law, 17, 18, 42-45.

PARTITION.

1. **EFFECT OF DECREE.**—A decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title. (*Potrero Nuevo Land Co. v. All Persons*, 743.)

2. **LEASEHOLD INTERESTS IN BEACH AND WATER LOTS OF SAN FRANCISCO—PARTITION SALE—INTERESTS ACQUIRED BY PURCHASERS.**—Purchasers at a partition sale of leasehold interests in "beach and water lots" situated in the city and county of San Francisco acquire the interests of such partitioners at the time of sale and nothing more, and the subsequent purchase by one of such purchasers of the reversionary interest of the state in such lots does not inure to the benefit of his copurchasers. (*Id.*)

3. **TITLE OF PURCHASER UPON PARTITION SALE.**—The sale under a partition decree is a judicial sale, and the rule in execution sales that the purchaser takes the precise interest of the defendant and that after-acquired title by the seller does not pass to the purchaser is applicable thereto. (*Id.*)

PARTITION WALL.

1. **LOCATION—SUFFICIENCY OF EVIDENCE.**—In this action by the owners of the south half of a city lot and of the remainder in fee

PARTITION WALL (Continued).

of the north half against the life tenant of the latter half to compel the removal of a partition wall which the defendant at the time of the commencement of the action had commenced to construct in the building which covered the entire frontage, it is held that the evidence was sufficient to establish the fact that a portion of the partition wall was located upon the plaintiff's side of the dividing line. (*Taft v. Washington*, 197.)

2. **REMOVAL OF WALL—COMPLETION PRIOR TO SERVICE OF RESTRAINING ORDER—POWER OF COURT.**—In such an action the court has power to compel the removal of the partition wall, notwithstanding the wall was completed before the service of any restraining order. (*Id.*)

PARTNERSHIP.

1. **PURCHASE AND SALE OF OIL LANDS—NATURE OF TRANSACTION—CONFLICT OF EVIDENCE—FINDINGS CONCLUSIVE.**—In this action to recover profits alleged to have accrued on account of a joint enterprise entered into between appellant and respondent with respect to the purchase and sale of certain oil-producing lands, it is held that the record presents a state of conflicting evidence as to the nature of the agreement between the parties upon which the findings against the claim of appellant of a partnership are conclusive. (*Stroud v. Fairbanks*, 5.)
2. **CERTIFICATE OF PARTNERSHIP—USE OF INITIALS.**—A certificate of copartnership which sets forth the initials of the respective partners' given names instead of their names in full is sufficient. (*Hill v. Nerle*, 473.)

See *Banks*, 4, 5.

PAYMENT. See *Promissory Note*, 7, 8; *Sale*, 15.

PERJURY. See *Criminal Law*, 129-131.

PHYSICIAN AND SURGEON. See *Negligence*, 2-3.

PLACE OF TRIAL.

1. **RESCISSION OF CONTRACT OF SALE OF REAL PROPERTY—FRAUD—RECOVERY OF MONEY PAID.**—An action to rescind a contract for the sale of real property and to recover the money paid thereunder on the ground of fraud is not an action for the determination of some right or interest in real estate within the meaning of section 392 of the Code of Civil Procedure, and is properly transferred to the county of the residence of the defendant upon motion therefor duly made. (*Terry v. Rivergarden Farms Co.*, 59.)
2. **NATURE OF ACTION—RELIEF UPON DEFAULT.**—The nature of an action is to be determined from the allegations of the complaint

PLACE OF TRIAL (Continued).

and the character of the judgment which might be rendered upon default. (Id.)

3. **JOINDER OF REAL AND PERSONAL ACTION—VENUE.**—When a real and personal action are joined, the case may be transferred to the residence of the defendant. (Id.)
4. **ACTION TO RESCIND CONTRACT OF SALE—MONEY JUDGMENT AGAINST CODEFENDANT—VENUE.**—An action to rescind a contract of sale of real estate and to recover the money paid thereunder brought against two defendants, one of whom was not a party to the contract and only liable to a money judgment, is properly transferred to the county of the residence of such defendant. (Id.)
5. **MOTION FOR CHANGE OF PLACE OF TRIAL—INTERLINEATIONS AND ERASURES IN AFFIDAVITS—FAILURE TO EXPLAIN—ERRONEOUS DENIAL OF MOTION.**—On a motion for a change of place of trial, where in the notice of motion and the affidavit of merits, and other affidavits offered thereon, there were many interlineations and erasures, the failure of the moving party, upon request of the court, to say whether the alterations were made prior to the execution of the instrument does not authorize the court to exclude them from consideration and to deny the motion, where the affidavit of merits in its original form, ignoring the alterations, embraces all the essential averments of a sufficient affidavit of merits. (Cavitt v. Raje, 659.)
6. **ALTERATION OF INSTRUMENT—WHEN MATERIAL.**—If the alterations changed the meaning of the language of the instrument, or if it remedied a defective affidavit, the change would be regarded as material, and the affidavit could not then have been considered without a satisfactory explanation. (Id.)
7. **AFFIDAVIT OF MERITS—SUFFICIENCY OF.**—Where in one place in the affidavit of merits as it read originally the word "stated" is omitted, the affidavit reading "I further say that I have fully and fairly — the said case in this cause" to my counsel, etc., but from what appears later in the affidavit, and reading it as a whole, it is clear that the defendant in effect avers that he made a full and fair "statement" of the case in the cause to his attorneys, the omission is not material. (Id.)
8. **CHANGE OF DOCUMENT—WHEN IMMATERIAL.**—Any change made in a document after its execution, which merely expresses what would otherwise be supplied by intendment, is immaterial, and the document is in effect unaltered by it. (Id.)

PLEADING.

1. **VARIANCE BETWEEN ALLEGATIONS AND EXHIBIT—WAIVER.**—A variance between the direct allegations of a complaint and a copy of an instrument set forth therein, or an exhibit attached thereto,



PLEADING (Continued).

can be successfully attacked only by special demurrer, and cannot be taken advantage of by general demurrer. (*Linz v. McIver & Becker*, 470.)

2. **UNVERIFIED ANSWER—EFFECT OF—REMEDY OF PLAINTIFF.**—An unverified answer to a verified complaint does not admit all of the allegations of the complaint to be true in the absence of a seasonable objection to the failure of the defendant to verify his answer. The remedy of the plaintiff in such a contingency is to move the trial court to strike out the answer or for judgment upon the pleadings for want of an answer. (*Hill v. Nerle*, 473.)
3. **LACK OF VERIFICATION—TRIAL WITHOUT OBJECTION—WAIVER.**—Where the case goes to trial and is heard and determined upon the issues purporting to have been raised by the pleadings of the parties without a previous objection upon the part of the plaintiff to the lack of verification of the defendant's answer, the defect will be deemed to have been waived. (*Id.*)
4. **ACTION FOR GOODS SOLD AND MONEYS ADVANCED—UNVERIFIED ANSWER—TRIAL WITHOUT OBJECTION—UNWARRANTED JUDGMENT.**—In an action for goods sold and delivered and for moneys advanced for the payment of freight and transportation charges upon the goods, the failure of the defendants to verify their answer to the plaintiff's verified complaint is not sufficient to support a judgment for the moneys advanced as an admitted fact under the pleadings, where it is found that the defendants were not indebted therefor, and no motion to strike out the answer or for judgment on the pleadings was made, and the case tried upon the pleadings as presented. (*Id.*)
5. **ACTION ON PROMISSORY NOTE—AMENDMENT OF COMPLAINT—DATE OF ASSIGNMENT OF NOTE—DISCRETION NOT ABUSED.**—In an action to recover on an assigned promissory note there was no abuse of discretion in allowing the plaintiff to amend his complaint when the case was called for trial, so that the date of the assignment would appear as of the date of the execution of the note, instead of the date mistakenly alleged in the original complaint, where the defendant was not placed at any disadvantage by the amendment, and his principal defense rested upon a release of the defendant from the note. (*Snyder v. Miller*, 566.)
6. **ALLOWANCE OF AMENDMENTS TO PLEADINGS.**—The allowance of amendments to pleadings is a matter resting in the sound legal discretion of the trial court, and great liberality should be shown by it in permitting, where it can be done without working great delay, such amendments to pleadings as will facilitate the production of all the facts bearing upon the questions involved in the action. (*Id.*)
7. **ACTION FOR GOODS SOLD—FAILURE TO DENY INDEBTEDNESS—COUNTERCLAIM.**—In an action for the recovery of a balance due upon

PLEADING (Continued).

an open book account for goods, wares, and merchandise sold and delivered, the failure of the defendant to expressly admit or deny the allegations of the complaint does not deprive him of the right to set up a counterclaim growing out of contract, as an offset to the indebtedness pleaded in the complaint, notwithstanding the amount of such counterclaim exceeds the amount of the plaintiff's demand and that no affirmative judgment is asked for by the defendant. (*Calara Valley Realty Co. v. Smith*, 589.)

8. **FAILURE TO DENY ALLEGATION—ADMISSION.**—Where a defendant fails to deny a material fact alleged in a complaint, such failure is tantamount to an admission of the fact so alleged. (*Id.*)
9. **PLEADING OF COUNTERCLAIM—TENDER OF ISSUE.**—The pleading of a counterclaim without directly denying the allegations of the complaint is sufficient to tender an issue upon the question whether the plaintiff is entitled to a judgment for the full amount of the claim or any part thereof upon which he has sued, and the right to support such special defense is not affected by the fact that the alleged counterclaim exceeds that of the debt sued for by the plaintiff, and that the defendant asks for no affirmative relief. (*Id.*)
10. **CODE PROVISIONS AS TO COUNTERCLAIMS—INTENT OF LEGISLATURE—AVOIDANCE OF MULTIPLICITY OF ACTIONS.**—The evident intent of the legislature in passing the code provisions relating to counterclaims was that all the matters that may be the subject of litigation between the parties within the limitations prescribed shall be settled in one action. (*Id.*)
11. **OMISSION TO SIGN COMPLAINT—WAIVER.**—The omission to sign a complaint is not jurisdictional, and the defect is waived where no objection is made thereto in the trial court. (*Hellings v. Wright*, 649.)

See Appeal, 2; Broker, 6; Claim and Delivery, 1, 2; Corporation, 6-8; Ejectment, 1-3; Fraud, 4; Fraudulent Conveyance, 5; Negligence, 10, 15, 16; Office and Officers, 4, 6; Promissory Note, 1-5; Sale, 10, 11, 25, 28; Specific Performance, 4; Statute of Frauds, 5, 6; Street Assessment, 5.

POSSESSION. See Adverse Possession; Ejectment; Partition.

PRACTICE.

1. **NONSUIT—ORDER FOR FINAL—ENTRY IN MINUTES—CONSTRUCTION OF SECTION 581, CODE OF CIVIL PROCEDURE—APPEAL.**—Since the amendment of 1897 to section 581 of the Code of Civil Procedure, the entry of an order granting a nonsuit in the minutes of the court is sufficient, and it need not be entered in the judgment-book at all; and such order so entered is a final judgment in the sense used in section 939 of the Code of Civil Procedure, providing for appeals. (*Commins v. Guaranty Oil Co.*, 139.)

PRACTICE (Continued).

2. **TRIAL—LACK OF NOTICE—NEW TRIAL.**—A defendant in an action against whom a judgment is rendered is entitled to a new trial where the trial was had in the absence of the defendant and of counsel representing him, and it is made to appear that no notice of the time of trial was given to the attorneys of record of the defendant or to the attorney whom the defendant was endeavoring to have substituted for them, or to the defendant himself, except by the mailing of a card to him by the clerk of the court. (*McMunn v. Lehrke*, 298.)
3. **ATTORNEY AND CLIENT—CEASING TO ACT—DUTY OF ADVERSE PARTY.** Where upon the calling of a case for trial it appears that the defendant had attorneys of record who, in the language of section 286 of the Code of Civil Procedure, had "ceased to act as such" and were not present, and that the defendant was without a representative, the adverse party must, before any further proceedings are had against the party thus situated, by written notice, require such party to appoint another attorney or to appear in person. (*Id.*)
4. **APPEARANCE BY ATTORNEY—DUTY OF COURT.**—A party to an action has the right to change his attorney, but such change must be effected in the manner provided by the statute, and where a party to an action or proceeding appears in court by an attorney, he must be heard through him. (*Id.*)
5. **CONSTRUCTION OF SECTION 473, CODE OF CIVIL PROCEDURE—REMEDIAL PROVISION—DISCRETION.**—The remedial provision of the statute found in section 473 of the Code of Civil Procedure is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure, and the discretion of the court ought always to be exercised in such manner as will subserve rather than impede or defeat the ends of justice. (*Id.*)
6. **DEFAULT—ORDER SETTING ASIDE—WHEN JUSTIFIABLE.**—An oral stipulation granting time to plead to plaintiff's complaint made with the plaintiff instead of his attorney is not binding; but reliance upon it is merely inadvertence and excusable neglect, upon a showing of which the court is justified in setting aside a default. (*Koehler v. D. Ferrari & Company*, 487.)
7. **TRIAL—PARTIAL HEARING—TRANSFER TO ANOTHER DEPARTMENT—RESETTING OF CAUSE—LACK OF NOTICE—JUDGMENT PROPERLY VACATED.**—A judgment is properly vacated upon the ground that no valid notice of the setting of the cause for trial was given to the intervener or her counsel, where it is shown that after a partial trial had in one department of the superior court in the presence of and with the consent of counsel, the cause was transferred to another department of the same court "for a continuation of the trial" before the same judge, and there placed on the calendar in the absence of counsel for the intervener, and without his knowl-

PRACTICE (Continued).

edge or consent. (*Hagenkamp v. Equitable Life Assurance Society of the United States*, 713.)

8. **EXCUSABLE NEGLIGENCE OF COUNSEL—ENTRY OF WRONG DATE IN DIARY.**—An entry by an attorney in his diary of a wrong date of the trial of an action is such an inadvertence and excusable neglect as will justify the vacating of a judgment in the absence of any suggestion that it was deliberately done as the foundation for a dilatory move in the case. (*Id.*)

See Appeal; Claim and Delivery; Costs; Evidence; Execution; Findings; Garnishment; Instructions; Judge; Judgment; Justice's Court; Mandamus; New Trial; Partition; Place of Trial; Pleading; Summons.

PRESCRIPTION. See Adverse Possession.

PRINCIPAL AND AGENT. See Agency.

PROBATION. See Office and Officers, 1-3.

PROMISSORY NOTE.

1. **WANT OF CONSIDERATION—PLEADING.**—The defense of want of consideration for the execution of a promissory note or other instrument is new matter, which must be specially pleaded; but where the answer says in so many words that the note sued on was executed without any consideration whatever, it states a good defense. (*Rivera v. Cappa*, 496.)
2. **DURESS—WANT OF CONSIDERATION—SUFFICIENCY OF PLEADING.**—A general allegation of want of consideration in the answer, taken in connection with an averment that the note was executed and delivered to the payee as a result of duress, sufficiently pleads a defense, in the absence of a special demurrer. (*Id.*)
3. **APPEAL—WAIVER OF OBJECTION.**—In such a case, even if an allegation of want of consideration be considered as a conclusion of law, the objection made after the trial of the case upon the merits will not be considered upon an appeal supported only by a record which does not show that such an objection was interposed by demurrer or otherwise in the court below. (*Id.*)
4. **ACTION ON PROMISSORY NOTE—PLEADING—AMOUNT DUE—CONCLUSION OF LAW.**—In an action on a promissory note, where the answer admits the execution of the note, and alleges that the principal and interest remain wholly unpaid, but denies that the same is due and owing, or that any amount is due and owing, the admission is of the ultimate fact as to nonpayment, and the denial is a mere conclusion of law, which should be disregarded. (*Pacific Coast Mail Order House v. Stillens*, 613.)

PROMISSORY NOTE (Continued).

5. **CROSS-COMPLAINT—ALLEGED FAILURE OF CONSIDERATION—INSUFFICIENT DEFENSE.**—In such case, where there was attached to defendant's answer a set of allegations termed a cross-complaint, in which the execution of the notes sued on was admitted, but it was alleged that the same were given in exchange for certain shares of stock of the plaintiff corporation, and the further consideration that plaintiff would extend certain favors to defendant because of the purchase, and that plaintiff had agreed in consideration of the execution of the notes that a certain trade discount certificate should be issued, providing that for a period of ten years defendant should be entitled to a discount from catalogue prices of merchandise purchased from plaintiff, and that, after the certificate had been issued, the privileges therein stated were repudiated by plaintiff corporation, which thereafter refused to allow the discounts, and that as a further consideration inducing the execution of the notes defendant was promised a catalogue showing prices of goods for sale by plaintiff, which catalogue was never furnished, and it was represented that plaintiff was a "strong corporation, and in eighteen months or thereabouts would pay dividends," which allegation was alleged to be false, and intended to deceive defendant, and was relied upon by and did deceive the latter, the alleged cross-complaint does not state a cause of action for damages, and is insufficient to support a judgment of rescission, it failing to allege the value of the stock or of the alleged privileges which were denied plaintiff, and there being no allegation of tender back of the stock, or vigilance shown by defendant asserting the right to rescind. (Id.)
6. **ACTION ON PROMISSORY NOTE—APPEAL FROM JUDGMENT—JUDGMENT-ROLL—DEFENSE OF ACTION PENDING NOT REVIEWABLE.**—Upon an appeal taken upon the judgment-roll alone in an action upon a promissory note, the defense that the same cause of action was pending in another action at the time such judgment was entered cannot be considered, for there is nothing in the record to show that such defense was established. (*Union Trust Company of San Francisco v. Ensign-Baker Refining Co.*, 641.)
7. **ACTION ON PROMISSORY NOTES—PAYMENT—ACCEPTANCE OF ORDER—WHEN ACTION NOT PREMATURE—CREDIT ON NOTES.**—In an action on promissory notes, which by their terms were due when the action was commenced, where it appeared on cross-examination of the plaintiff that he had accepted as payment on the notes a certain order for the payment of money drawn on a third party payable after the time the action was commenced, which order was for an amount less than the face of the notes, it cannot be said that the action was prematurely commenced, but the amount of the order should be credited on the amount found due on the notes, and it is immaterial whether a judgment obtained on the order was paid. (*White v. Standard Lumber & Wrecking Co.*, 646.)

PROMISSORY NOTE (Continued).

8. **LIABILITY OF INDORSERS—WAIVER OF DEMAND, PROTEST, AND NOTICE.**—Where promissory notes state that “the makers and indorsers of this note hereby waive diligence, demand, protest, and notice,” the indorsement on the back of the notes constitutes a waiver without any separate statement thereof. (*Id.*)
9. **INDORSEMENT—PASSING OF TITLE.**—The signature of the payee of a promissory note on the back below the words “demand, notice and protest waived” constitutes a sufficient indorsement to pass the title to the holder. (*Bucker v. Carpenter, 678.*)
10. **EVIDENCE—ASSIGNMENT—TIME OF.**—In an action on a promissory note, it is not error to allow the plaintiff to testify, over objection, when and where the note was assigned to him, the objection not being that the question assumed an assignment made, where the witness testified that the note was assigned to him for a valuable consideration and had never been paid. (*Id.*)
11. **WANT OF CONSIDERATION—INVALID DEMANDS—DEFENSE.**—A promissory note, given in assumption of an alleged indebtedness which in fact did not exist, has no consideration to support it, and a new promissory note executed in lieu of the first at the date of its maturity also lacks consideration, and this fact may be pleaded in defense to an action thereon. (*Pacific Railways Advertising Co. v. Carr, 722.*)
12. **CONTRACT—CONSIDERATION.**—A promise to perform a legal obligation is not a sufficient consideration for a contract based thereon; neither is the release of a purported claim against one upon whom there rests no legal or moral obligation to pay the same a sufficient consideration for a third party's promise to pay such non-enforceable claim, unless it be upon the compromise of a doubtful or disputed claim. (*Id.*)
13. **RENEWAL OF NOTE—WANT OF CONSIDERATION.**—A note given in renewal for one void for want of consideration is, like the first, invalid and unenforceable. (*Id.*)
14. **VOID NOTE—EXTENSION OF TIME OF PAYMENT—LACK OF CONSIDERATION.**—Giving an extension of time within which to pay a void note constitutes no consideration for a renewed promise to pay same. (*Id.*)
15. **CONSIDERATION—INNOCENT PURCHASER—INSTRUCTION.**—In an action on a promissory note, negotiable in form, and payable to the order of the defendant, who indorsed and delivered it in purchase of certain corporation stock, in which sale the seller gave an option to the purchaser of returning the stock within a certain time, which option it does not appear was ever exercised or the stock returned or offered for return, and there is nothing in the record to show that the note was executed without consideration or procured by fraud, it is not error for the court to refuse to

PROMISSORY NOTE (Continued).

instruct the jury that the burden of proof rested upon plaintiff to show that he purchased the note without knowledge that it was obtained by fraud or without consideration. (*Robertson v. Ballou*, 711.)

See Pleading, 5.

PUBLIC LANDS. See Adverse Possession, 3, 4.

PUBLIC OFFICERS. See Office and Officers.

QUIETING TITLE. See Judgment, 1, 4; Water and Water Rights, 2.

RAPE. See Criminal Law, 132, 133.

RECEIVER.

1. **APPEAL FROM ORDER OF APPOINTMENT—RECORD—BASIS OF ORDER—PRESUMPTION.**—Upon an appeal from an order appointing a receiver, where there is no bill of exceptions in the transcript or other record showing upon what evidence the court based its order, the presumption must be indulged in support of the action of the court, that it had before it facts sufficient to justify it in making the order, notwithstanding the facts which are disclosed by the complaint might not themselves, taken alone, be enough to warrant the appointment under section 564 of the Code of Civil Procedure. (*Ulm v. Prather*, 92.)
2. **DISSOLUTION OF CORPORATION—EXPIRATION OF CHARTER—JURISDICTION OF SUPERIOR COURT.**—Upon the dissolution of a corporation by expiration of its charter, the jurisdiction of the superior court to appoint a receiver is limited by the provisions of section 565 of the Code of Civil Procedure, as in all other classes of dissolution, to the particular superior court of the county where the corporation carries on its business, or has its principal place of business. (*Henderson v. Palmer Union Oil Co.*, 451.)
3. **CONSTRUCTION OF CODE PROVISIONS.**—The provisions of section 400 of the Civil Code and section 565 of the Code of Civil Procedure were not intended to apply in case of dissolution of a corporation by and according to any particular method. (*Id.*)
4. **TIME OF DISSOLUTION—EFFECT OF.**—The provisions of section 565 of the Code of Civil Procedure are not rendered inapplicable to a case where the corporation has been dissolved for a considerable time, because of the use of the words therein "upon the dissolution," as such phrase means "after dissolution," and is not limited to any particular lapse of time. (*Id.*)

See Appeal, 1-5.

RESCISSION. See Sale, 12, 24.

RES JUDICATA. See Appeal, 1; Divorce, 1, 2; Fraud, 5; Judgment, 3.

RIGHT OF WAY. See Adverse Possession, 2, 3; Easement.

RIVER. See Criminal Law, 67-70.

SALE.

1. **ACTION BY SELLER—BREACH OF CONTRACT TO PURCHASE BOTTLES—MEASURE OF DAMAGES—SECTION 3353, CIVIL CODE.**—In an action by a seller for breach of a contract to purchase a certain specified quantity of quart bottles, the measure of damages is that fixed by section 3353 of the Civil Code, which provides that in estimating damages the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a sale. (*Lund v. Lachman*, 31.)
2. **EVIDENCE—LACK OF DILIGENCE IN MAKING SALES—NOMINAL DAMAGES.**—Where, in such an action, it is shown that the seller, upon the refusal of the buyer to accept the goods, removed the same to a warehouse, where they were stored and insured, and from time to time sold at private sale at varying prices for an aggregate sum less than the sum total of the contract price, instead of being taken to the nearest market, where they could have been sold at an advance of the contract price, the seller is entitled at most to but nominal damages. (*Id.*)
3. **DUTY OF SELLER—PROCURING OF HIGHEST MARKET PRICE—CONSTRUCTION OF SECTION 3353, CIVIL CODE.**—Under the provisions of section 3353 of the Civil Code, it is the duty of the seller, regardless of his business capacity or ability along the particular line of goods forming the subject matter of the broken contract, to go into the open market and obtain for the rejected goods the highest obtainable market price therefor. (*Id.*)
4. **MARKET VALUE—MEANING OF.**—The market value of a commodity is the highest price in the market where it is offered for sale which those having the means and inclination to buy are willing to pay for it. (*Id.*)
5. **EVIDENCE—PREVAILING MARKET PRICE.**—In such an action it is not error to permit evidence of the prevailing market price during the period following the tender and rejection of the bottles. (*Id.*)
6. **FAILURE TO ALLOW NOMINAL DAMAGES—INSUFFICIENT GROUND FOR REVERSAL.**—In such an action, the refusal to allow the plaintiff at least nominal damages will not warrant the reversal of the judgment or the granting of a new trial, as such a judgment would not carry costs. (*Id.*)

SALE (Continued).

7. **NOMINAL DAMAGES—COSTS.**—Nominal damages have been defined to mean merely an inconsiderable, trifling sum, such as a penny, one cent, six cents, and to carry costs a judgment of the superior court must amount to the sum of three hundred dollars. (Id.)
8. **PERSONAL PROPERTY—DELIVERY NOT ESSENTIAL.**—A "sale" is a contract by which, for a pecuniary consideration, called a price, one transfers an interest in property, and it may be consummated without a delivery of the property to the vendee. (*Johnson v. Dixon Farms Co.*, 52.)
9. **DELIVERY OF POSSESSION—RULE OF EVIDENCE.**—The rule requiring the possession of personal property to be delivered to the vendee to render the sale valid as against the creditors of the vendor is one of evidence only, and in no way enters into the contract of sale as an element thereof, so far as the parties thereto are themselves concerned. (Id.)
10. **ACTION FOR PURCHASE PRICE OF HAY—PLEADING—OMISSION TO ALLEGE DELIVERY—SUFFICIENCY OF COMPLAINT.**—A complaint in an action to recover the purchase price of certain hay which alleges that the plaintiff on or about a designated date "sold" to the defendant such property, that the latter promised to pay for the same, and that it had defaulted in its promise, states a cause of action, and no averment of delivery is essential. (Id.)
11. **AMENDMENT OF COMPLAINT—SHOWING OF DELIVERY—NONSERVICE OF COPY—LACK OF PREJUDICE.**—An order made during the trial permitting the plaintiff to amend his complaint by adding words thereto showing a delivery of the hay, and the failure of the plaintiff to serve a copy of such amendment upon the defendant, which was not represented at the trial and which merely filed an unverified answer to the verified complaint, is not a sufficient ground of reversal, in view of the amendment of section 4½ of article VI of the constitution. (Id.)
12. **CONTRACT—EXCHANGE OF STALLION AND MULE—RESCISSION.**—In an action for the rescission of a contract for the exchange of a stallion for a jack mule, where the court found upon sufficient evidence that the exchange had been brought about through certain statements made by the defendant, which amounted to an express warranty of the foal-producing qualities of the jack, and which had proven untrue, the plaintiff was entitled to rescind the contract, where he did so promptly. (*Coats v. Hord*, 115.)
13. **FORM OF JUDGMENT—RETURN OF PROPERTY.**—In such a case the judgment which, while giving to the plaintiff in the form of damages all that the evidence showed the stallion to be worth, made no provision for the return of the defendant's property, was erroneous in this respect, and should be modified. (Id.)
14. **WARRANTY—ESSENTIALS.**—It is not necessary, in order to create an express warranty of an article of personal property, that the word

SALE (Continued).

"warrant" should be employed or that any particular or any formal words of warranty should be used. Any affirmation made at the time of the sale or exchange as to the quality or condition of the thing sold will be treated as a warranty if it was so intended, and if the other party acquired the property on the faith of such affirmation. (Id.)

15. **CONTRACT—SALE OF BANK STOCK—PAYMENT.**—Where an agreement for the sale and delivery of a certain number of shares of the capital stock of a banking corporation provides for the sale and delivery of the stock upon payment of the price on or before a specified date, and that payment shall be deemed to be sufficiently made to the seller by payment of the price to the bank for account of the seller, and that the stock shall upon such payment be delivered to the purchaser on demand, the delivery by the seller to the bank of his certified check for such amount payable to the bank, or bearer, constitutes payment for the stock under the terms of the contract, and does not amount to merely a tender of payment conditioned upon delivery of the shares of stock. (*Bank of Bakersfield v. Conner*, 153.)
16. **ACTION OF INTERPLEADER — EVIDENCE — FORM OF CHECK.**—In an action of interpleader brought by the bank upon which the check was drawn to determine the rights of the parties thereto, it is not error to refuse to permit the maker of the check to testify why the word "bearer" was left on the check, or whether he intended that it should be left thereon at the time he made it. (Id.)
17. **OWNERSHIP OF CHECK—ELECTION OF PURCHASER.**—Where the purchaser of the stock elects to continue his demand for performance of the contract, he is not entitled to recall the payment made by him, notwithstanding that under the terms of the contract the obligation of the seller to deliver the stock and of the buyer to pay the price were concurrent conditions. (Id.)
18. **DELIVERY OF CHECK TO SELLER.**—In such an action it is not prejudicial error to permit the cashier of the bank to which the check was delivered to testify that he delivered it to the seller on the same day that it was received by the bank. (Id.)
19. **SALE OF INTOXICATING LIQUORS—RECOVERY OF PRICE—CONSPIRACY TO OBTAIN LICENSE—VOID CONTRACT.**—A wholesale liquor firm engaged in the business of selling intoxicating liquors which participates in a conspiracy to circumvent the provision of a county ordinance which prohibits any person engaging in the saloon business in the county who was not a citizen of the United States, cannot legally enforce the payment of sales of liquors made by it to the persons to whom a license for the conducting of such business was thus illegally issued. (*Scheeline v. Pezzola*, 266.)

SALE (Continued).

20. **CONTRACTS—LAWFUL PURPOSE ESSENTIAL.**—A contract must have a lawful purpose, and transactions in violation of law cannot be made the foundation of a valid contract. (Id.)
21. **ILLEGAL SALE OF LIQUORS—VOID CONTRACT.**—Where the illegal sale of liquor enters into any contract as an inseparable part of its consideration, or the terms or conditions of the contract are inseparably connected with the illicit traffic in liquors, it is against public policy and immoral, and therefore void. (Id.)
22. **BREACH OF CONTRACT TO DELIVER HOPS—CONTEMPORANEOUSLY EXECUTED INSTRUMENTS—SINGLE TRANSACTION—PAROL EVIDENCE.**—In an action to recover damages for the refusal to make delivery of a designated quantity of hops produced and picked during the season of 1911 upon the ranch of the defendants, as alleged to have been required of such defendants by the terms of a written contract, the defendants are entitled to show by parol evidence, without violating the rule prohibiting the admission of oral evidence to alter, vary, or contradict the terms of a written instrument, the contemporaneous execution of two other instruments calling for similar deliveries in the years 1909 and 1910, and that such instruments with the instrument in suit, by the terms of a collateral contemporaneous oral agreement, constituted but one single and indivisible contract covering a single transaction, but which for the convenience of the parties was expressed in three separate instruments, and which were executed by the parties thereto at the same time upon the consideration and with the understanding and agreement that the three instruments would constitute but a single contract for the purchase and sale of the same quantity of crops per year for three successive years from the crops produced upon the ranch of the defendants; and that therefore the failure of the plaintiffs to accept the full quantity for 1910 justified the refusal to make delivery from the crop of 1911. (*Torrey v. Shea*, 313.)
23. **SEVERAL CONTRACTS—SINGLE TRANSACTION—PAROL EVIDENCE.**—While ordinarily the identity of the parties to several instruments will be disclosed by reference to the instruments themselves, the question as to whether or not such instruments were contemporaneously executed and intended by the parties thereto to cover a single transaction oftentimes cannot be ascertained from an inspection of the instruments themselves, and consequently, if the intention be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments. (Id.)
24. **DEFENSE TO ACTION—RESCISSION—REFORMATION NOT ESSENTIAL.**—In such an action the defendants are entitled as a matter of law

SALE (Continued).

to defend against the action upon the theory that the three instruments constituted but a single contract, and that a breach of one constituted a failure of consideration which entitled them to rescind the whole, and are not obliged to resort to the remedy given by section 3399 of the Civil Code for the reformation of the contract which through fraud or mistake failed to express the intention of the parties. (*Id.*)

- 25. DAMAGES—BREACH OF CONTRACT—PLEADING—SUFFICIENCY OF EVIDENCE—GENERAL VERDICT.**—Where in an action for damages for breach of a contract to purchase goods to be manufactured and delivered, the complaint purports to state a cause of action in two counts, one upon an oral contract and the other on a written contract, and the evidence is amply sufficient to support the finding of the jury implied from the general verdict that the defendant breached the oral contract, the insufficiency of the evidence to establish the breach of the written contract becomes immaterial. (*Merrill v. Kohlberg*, 382.)

- 26. STATUTE OF FRAUDS—SIGNING OF MEMORANDUM—PART RECEIPT.**—Where it is pleaded and proven that the written memorandum of the contract relied upon in the first count of the complaint was signed by the defendant and also that the defendant received and accepted part of the goods, the right of the plaintiff to recover is not inhibited by the statute of frauds. (*Id.*)

- 27. MEASURE OF DAMAGES—TRIAL UPON ERRONEOUS THEORY—APPEAL—RULE.**—Where the counsel for the defendant insisted over the plaintiff's protest that the trial should proceed upon the erroneous theory that the measure of damages was covered and controlled by sections 3311 and 3353 of the Civil Code, which in effect declare the measure of damages for the breach of a buyer's agreement to purchase personal property is the difference between the contract price and the market value, he cannot insist upon appeal that the plaintiff's damages should have been established under section 1512 of such code, which in effect provides the measure of damages in cases of prevention of performance of contracts to be the difference between the cost of manufacture and the contract price. (*Id.*)

- 28. CONTRACT—SALE OF RAISIN CROP—PLEADING—AMENDMENT OF COMPLAINT—REFUSAL TO STRIKE FROM FILES—SINGLE TRANSACTION.**—In this action, which involved but a single transaction of the alleged sale by plaintiff and purchase by defendant of a certain lot of raisins at a certain price per pound alleged to have been delivered in a certain number of sweat boxes, as to which latter the only dispute was whether or not the defendant had appropriated them to its own use and benefit and as to their value, it is held that the defendant was not prejudiced by the refusal to strike the second amended complaint from the files on the ground that it stated a

SALE (Continued).

new cause of action, as the facts all related to one and the same transaction and the relative rights of the parties were fully exploited at the trial upon such complaint and the answer thereto. (*Bronge v. Mowat & Co.*, 388.)

29. **QUALITY OF RAISINS—SUFFICIENCY OF EVIDENCE.**—It is held herein that there was evidence from which the jury were justified in finding that the raisins were of the quality called for by the contract. (*Id.*)
30. **APPEAL—FINDING ON CONFLICTING EVIDENCE.**—Where the evidence is conflicting and there is substantial evidence sufficient to justify the finding in question, the reviewing court will not disturb it even though the evidence would have justified a finding favorable to the opposing party. (*Id.*)
31. **TIME OF DELIVERY—SUFFICIENCY OF EVIDENCE.**—It is also held that considering all the circumstances, together with the failure to express a definite date for the delivery of the raisins, the jury were justified in finding that there was no violation of the terms of the contract so far as the time of delivery was concerned. (*Id.*)
32. **ACCEPTANCE OF RAISINS—SUFFICIENCY OF EVIDENCE.**—Where it is shown that the raisins were such as were called for by the contract and were delivered on time, it became defendant's duty to accept and pay for them. (*Id.*)
33. **ACCEPTANCE OF PORTION OF RAISINS—EFFECT UPON DELIVERY—INSTRUCTION.**—An instruction "that the evidence is without contradiction in this case that the raisins in question were tendered to defendant, who thereupon accepted a portion thereof; and if you believe such evidence and so find, then the court instructs that the defendant is estopped from claiming that such raisins were not delivered on time," is erroneous, but without prejudice, where it is found on sufficient evidence that the raisins were of the proper quality and tendered on time. (*Id.*)
34. **SALE OF BOX SHOOK—LIABILITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—Where, in an action for the recovery of a sum of money for the sale and delivery of certain "box shook," it is shown that the factory of the corporation in the name of whom the goods were ordered and shipped was destroyed by fire prior to the time such order was given, and not rebuilt, and that at the time of the giving of such order about all that such corporation had left was its labels and its reputation for packing, and shortly before the giving of such order a new corporation was formed by the persons interested in the former corporation, which took over its offices, made a payment on account of the shook, and made resales thereof in its own name, a judgment against the new corporation is warranted. (*Coco Bay Mfg. Co. v. California Selling Co.*, 407.)
35. **EVIDENCE—INSOLVENT CORPORATION—RECORD OF ACTION.**—The record of an action brought in the year of the transaction in ques-

SALE (Continued).

tion against the corporation in whose name the goods were ordered, by one of its creditors, and which showed execution issued and returned unsatisfied, is properly admitted in evidence as tending to show the insolvent condition of such corporation at that time. (Id.)

36. **WITNESSES—RIGHT OF PARTY CALLING TO IMPEACH.**—There is no error in permitting the plaintiff to impeach the testimony of the president of the corporation in whose name the goods were ordered, notwithstanding he was called as a witness by the plaintiff, where it is shown that such witness was the vice-president and principal stockholder of the corporation, which was the real beneficiary in the transaction. (Id.)
37. **WITHDRAWAL OF OBJECTION TO EXCLUDED EVIDENCE—WAIVER.**—The defendant cannot complain on appeal of the procedure of the trial court after submission of the cause in admitting certain evidence offered by the defendant during the trial and excluded upon objection of the plaintiff, where plaintiff's counsel orally notified defendant's counsel of its withdrawal of such objection prior to its request to the court to make the order, and immediately thereafter notified defendant of such order, and the defendant took no action in the premises, notwithstanding the cause remained undecided for twelve days thereafter, and defendant made no reference thereto in its motion for a new trial. (Id.)
38. **WHEN NOT BY SAMPLE.**—Where an order for goods was given after an examination or an opportunity to examine, and the purchaser then and there paid part of the purchase price and an arrangement was entered into between him and the seller fixing a time for the payment of the balance and the shipment of the goods, it cannot be held that the sale was by sample, although the sellers, at the request of the purchaser, sent samples of the goods to the firm of the purchaser, this being apparently done in order that the latter might solicit orders from the customers of suits and cloaks to be cut up from the cloth from which the samples were taken when the cloth should arrive. (Alexander v. Stone, 488.)
39. **OPPORTUNITY TO EXAMINE GOODS—IMPLIED WARRANTY.**—Where the purchaser had an opportunity to examine the goods in such a case, there was no implied warranty as to the quality, even if the representative of the buyers failed to take advantage of the opportunity for examination given him. (Id.)
40. **EXPRESS WARRANTY.**—Where both buyer and seller of goods, by reason of their occupation, have expert knowledge of the kinds of goods in question, an expression of the latter at the time of the sale that the goods are first class is but the expression of an opinion, or what is termed "puffing," and not an express warranty of quality. (Id.)

SALE (Continued).

41. **CONTRACT—SALE OF BILLIARD-TABLES—DELAY IN DELIVERY—WAIVER OF OBJECTION.**—In a contract for the sale of billiard-tables, where the delivery of the tables was to be made "on or about the 5th day of June, 1915," and time was made of the essence of the contract, the words "on or about" are not to be construed to mean "exactly," but delivery within a reasonable time after June 5th would satisfy the condition, and a delay until June 9th was not an unreasonable lapse of time; and where on the latter date the purchasers advised the sellers of their inability to receive the tables and requested that they be shipped after June 20th, and on June 10th, after giving this last-mentioned notice, advised the sellers that they might be shipped on any date that was convenient, whereupon the latter immediately advised them that they would be shipped on the 17th of June, to which no objection was raised until the latter date, when the purchasers attempted to rescind their contract, but nowhere in the correspondence complained of any delay in delivery, the purchasers are estopped from complaining of delay in delivery. (*Passow & Sons v. Harris*, 559.)
42. **TENDER—WAIVER OF.**—In such a case, where the purchasers notified the sellers that they had revoked and countermanded the order, it was not necessary for the latter to make a tender of the physical property agreed to be sold before bringing suit for the purchase price. (*Id.*)

See Agency; Damages; Fraud, 1-4, 7-9; Pleading, 7, 8; Vendor and Vendee.

SAN FRANCISCO, CITY AND COUNTY OF. See Office and Officers, 7, 8; Partition.

SPECIFIC PERFORMANCE.

1. **BUILDING CONTRACT—SPECIFIC PERFORMANCE—WHEN NOT ENFORCEABLE.**—Courts of equity will not specifically enforce building contracts where performance cannot be consummated by one transaction, and when the contract, according to its terms, requires a succession of acts and a protracted supervision, with special knowledge and skill in its oversight and management. (*Crane v. Roach*, 584.)
2. **CONTRACT OF SALE—INTEREST IN LAND—WHEN NOT ENFORCEABLE.**—When a contract for sale of real estate is for any reason incapable of specific performance, it cannot form the basis of a valid claim to an interest therein, and when such claim is asserted, the owner of the real estate is entitled to a decree quieting his title thereto. (*Id.*)
3. **AGREEMENT TO ERECT HOUSE AND RESELL PROPERTY—ACTION TO QUIET TITLE BY SELLER—CLAIM OF INTEREST IN PROPERTY BY PURCHASER—FORM OF JUDGMENT.**—In an action in the usual form to

SPECIFIC PERFORMANCE (Continued).

quiet title to a certain house and lot, by one holding the legal title, in which the defendants by cross-complaint set up a contract between plaintiffs and defendants, providing, among other things, that in consideration of the transfer by defendant to plaintiffs of the land in question, and an agreement by the former to pay the latter a certain balance, the plaintiffs should erect a building upon the land according to certain plans and specifications, the purpose of the conveyance of the land being to secure performance of the contract on the part of defendant to repurchase the lot and building thereon, and the evidence showed that plaintiffs failed to live up to the terms of their contract, in that they did not erect the building according to the plans and specifications, whereupon the defendant claimed an interest in the real property adverse to the plaintiffs, the trial court properly decreed that the plaintiffs should keep the house and lot and pay to the defendant the amount of her outlay plus the enhanced value of the lot, the court having found that the defects in the building were irremediable and depreciated the value of the building. (Id.)

4. **PLEADING—ADEQUACY OF CONSIDERATION—FAIRNESS AND REASONABLENESS OF AGREEMENT.**—In such a case, although the answer and cross-complaint do not in terms allege the adequacy of the consideration or the fairness of the agreement, where they do in formal allegations set forth the facts constituting the defense and the circumstances under which both parties entered into the contract, the statement of facts is sufficient, and a demurrer thereto is properly overruled. (Id.)

STATE LANDS. See *Adverse Possession*, 3, 4.

STATUTE OF FRAUDS.

1. **PERFORMANCE OF CONTRACT WITHIN YEAR.**—An oral agreement between real estate brokers to make sales and divide commissions is not void under subdivision 1 of section 1624 of the Civil Code, where the employed broker could sell for cash or on the installment plan for a sufficient amount so that his commissions could be paid within the year. (*Hellings v. Wright*, 649.)
2. **AGREEMENTS NOT PERFORMABLE WITHIN YEAR—CONSTRUCTION OF STATUTE.**—The statute does not declare void a contract which may not be performed within a year, or which is not likely to be performed within that period, but it includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year. (Id.)
3. **PERFORMANCE OF CONTRACT WITHIN YEAR—PAYMENT OF CONSIDERATION AFTER YEAR—INSUFFICIENT DEFENSE TO RECOVERY.**—When a contract has been so far performed that nothing remains to be done but the payment of the consideration for the per-

STATUTE OF FRAUDS (Continued).

formance, the fact that the contract does not require the payment within a year furnishes no defense to an action for the price. (Id.)

4. **CONTRACT—EMPLOYMENT OF REAL ESTATE BROKER—IMPROPER DESCRIPTION OF PROPERTY.**—A contract employing a broker to sell real property is not void because the description of the property which the broker was employed to sell is insufficient under the statute of frauds. (*Healy v. Obear*, 696.)
5. **PLEADING.**—In an action by a real estate broker to recover his compensation, where the defendant does not plead the statute of frauds nor deny the contract in his answer, but, on the contrary, sets up the contract and alleges that it was the agreement entered into by the parties, he cannot on appeal maintain that the contract was void under the statute of frauds. (Id.)
6. **DENIAL OF CONTRACT.**—It is not essential that one seeking the protection of the statute of frauds must specially insist upon it in his pleadings further than to deny the execution of the contract. (Id.)

See *Broker*, 5; *Sale*, 26.

STATUTE OF LIMITATIONS. See *Corporation*, 1, 2; *Fraud*, 4.

STOCK AND STOCKHOLDERS. See *Corporation*.

STREET ASSESSMENT.

1. **STREET LAW—IMPROVEMENTS IN TOWN OF SANTA CLARA—REPEAL OF CHARTER PROVISIONS—CONSTITUTIONAL LAW.**—The provisions of section 13 et seq. of the act entitled, "An Act to Reincorporate the town of Santa Clara" (Stats. 1872, p. 251), relating to street improvements therein, and which authorized contracts to be entered into in advance of the levy and collection of the assessment, were repealed upon the adoption of section 19 of article XI of the constitution, notwithstanding such section in terms only specifies cities as coming within its provisions, and not towns. (*Ransome-Crummey Co. v. Woodhams*, 356.)
2. **STATUTORY CONSTRUCTION—WORD GIVEN PARTICULAR MEANING.**—When a word or phrase has been given a particular scope or meaning in one part or portion of a law, it is to be given the same scope and meaning in other parts or portions of the law and particularly of the same section thereof. (Id.)
3. **GENERAL LAWS APPLICABLE TO STREET IMPROVEMENTS.**—The adoption of such constitutional provision had the effect of not only repealing that portion of the charter of the town of Santa Clara as permitted street improvements to be completed before the assessments had been levied and collected, but of repealing the entire charter provision applicable to street improvements, and of rele-

STREET ASSESSMENT (Continued).

gating the town to the general laws as to its source of authority and procedure in the improvement of its public streets. (Id.)

4. **STREET LAW—RESOLUTION OF INTENTION—DESCRIPTION OF WORK—REFERENCE TO PLANS AND SPECIFICATIONS.**—In the matter of street improvement proceedings the law does not require that the resolution of intention shall in terms describe in detail the work to be done thereunder, but provides that the resolution may give that description by reference to plans and specifications contemporaneously created and adopted. (*Richmond Construction Co. v. Growney*, 427.)
5. **FORECLOSURE OF LIEN—CONSTRUCTION OF COMPLAINT—DESCRIPTION OF WORK—RESOLUTION OF INTENTION—REFERENCE TO PLANS AND SPECIFICATIONS.**—A complaint in an action for the foreclosure of a lien for grading a street, and for the construction of gutters on either side thereof and bridges at the cross-walks, which alleges the passage of a resolution of intention, wherein it was resolved "that gutters three feet wide, grouted, be constructed on both sides of the roadway . . . and that wooden bridges 4 ft. by 5 ft. be constructed over the gutters at each end of each cross-walk place, . . ." sufficiently describes, in the absence of a special demurrer for uncertainty and ambiguity, the work to be done upon such gutters and bridges, where it is also alleged in a subsequent paragraph of the complaint "that before passing the resolution for the construction of said work or improvement, plans and specifications and careful estimates of the costs and expenses thereof had been required by it to be furnished to said board by the city engineer of said city and special specifications therefor had been furnished by him." (Id.)
6. **STREET LAW—PROCEEDINGS UNDER ACT OF 1903—OBJECTIONS TO ASSESSMENT—NEGLECT OF CLERK TO PRESENT IN TIME—JURISDICTION OF COUNCIL.**—Upon proceedings had under the Street Opening Act of 1903, where the clerk of the city council, through inadvertence or other cause, fails and neglects, as provided by section 19 of such act, to present or lay before the council the assessment and objections filed thereto at the next regular meeting of the council after the expiration of the time for filing such objections, the council has no jurisdiction by the notice so given to act in the premises, but it does not thereby lose jurisdiction of the entire proceeding, and upon a republication of the notice, in accordance with the provisions of section 18 of the act, it has jurisdiction thereafter, upon presentation of the assessment and objections within the required time, to make an order confirming the assessment. (*Rindge Co. v. City Council of the City of Los Angeles*, 683.)

SUMMONS. See Justice's Court, 8-10.

SUPERIOR COURT. See Corporation, 3; County, 2.

SURETY. See Appeal, 8-10; Justice's Court, 1, 6.

TAXATION.

1. **INVALID SALE—REIMBURSEMENT OF PURCHASER—AMOUNT OF TAXES AND COSTS.**—A purchaser of lands at a delinquent tax sale is not entitled, upon the sale being declared invalid, to have paid to him by the owner the excess of the sum paid for the lands over and above the taxes, interest, penalties, and costs which were chargeable upon the lands at the time of the sale. (*O'Reilly v. All Persons*, 49.)
2. **OBJECT OF SALE.**—The primary object of the state in selling the land is to recover the taxes, penalties, costs, etc., and whoever pays more than the amount thereof does so as a volunteer, and at the risk of the proceedings being found invalid. (*Id.*)
3. **QUIETING TITLE—EVIDENCE—TAX DEED—INSUFFICIENT COMPLAINT—DEFECTIVE DESCRIPTION.**—In an action to quiet title to a lot of land wherein the plaintiff based his title upon a tax deed, it is error to admit in evidence the documentary proofs of the assessment, sale, and tax deed in support of such title, where the description of the land set forth in the complaint with all of its courses running either northeasterly or southeasterly is radically defective, in that it cannot be made to describe a rectangular piece of land, or to include more than a small triangular fraction of the lot to which the documentary evidence related and which the findings of the court described. (*Ghiselli v. Thorstensen*, 379.)

TENANTS IN COMMON. See Deed, 4, 5.

TRESPASS.

1. **POWER OF COURT OF EQUITY—INJUNCTION.**—A court of equity has power to compel cessation of a trespass irreparable in its character and of a continuing nature, and in the exercise of such power, removal of obstructions placed by the defendant upon the plaintiff's property may be enforced. (*Taft v. Washington*, 197.)
2. **TEARING UP PIPES—INJUNCTION.**—The court has also the power to enjoin the defendant from tearing up or disconnecting sewer and drain pipes, independent of any easement right which the plaintiff may have therein, as the accomplishment of such acts would constitute an injury to the inheritance. (*Id.*)

TRIAL. See Practice.

TRUST.

1. **CONVEYANCE OF REAL PROPERTY BY WIFE TO HUSBAND—NATURE OF CONTEMPORANEOUS ORAL UNDERSTANDING—LIFE ESTATE—SUFFICIENCY OF EVIDENCE.**—In this action to have a trust declared in certain real estate conveyed to the defendant by his wife a short time before her death, it is held that notwithstanding the sharp

TRUST (Continued).

and irreconcilable conflict in the statements of the respective parties as to the nature of the contemporaneous oral agreement, there is sufficient evidence to support the findings to the effect that the title of the defendant was to be in the nature of a life estate, with right to the income of the property with the fee in remainder to the plaintiffs at his death. (*McIntosh v. Hunt*, 779.)

2. **EVIDENCE—LETTER—INSUFFICIENT RECORD ON APPEAL.**—In such an action alleged error in refusing the admission in evidence of a letter written by the defendant to the husband of one of the plaintiffs in reply to a letter written by the latter explaining the nature and effect of the escrow arrangement in question, cannot be considered, where the record contains no copy of the excluded letter. (*Id.*)

UNDERTAKING ON APPEAL. See Appeal, 1-5, 8-10.

UNDUE INFLUENCE. See Gift, 4.

VENDOR AND VENDEE.

1. **CONTRACT—SALE OF LAND—OPTION TO RETURN—BREACH—RIGHT TO RECOVER PURCHASE MONEY AND INTEREST.**—Where on a sale of a certain interest in real property the vendor executed a written agreement to take the land back, if requested by the purchaser, at any time after one year and within two years, and pay the purchaser ten per cent on the investment, in an action by the purchaser for a breach of the contract, a finding in her favor is sustained, where the evidence shows that at or about the expiration of one year from the making of the agreement, and upon several occasions shortly thereafter, plaintiff notified the defendant orally and in writing that she accepted the option to reconvey, and upon each occasion offered to execute a deed conveying to him the lands upon the payment to her of the amount of the original purchase price, and interest for one year at ten per cent, which defendant refused and finally repudiated the obligation; and the fact that subsequent to defendant's repudiation of the agreement, and at or about the time of the expiration of two years, plaintiff again tendered a deed, coupled with a demand for an amount more than that due, will not overthrow the finding. (*Dean v. Hawes*, 689.)
2. **DEFINITION OF INVESTMENT.**—The word "investment" as commonly employed has been judicially defined to mean the putting out of money on interest in some form more or less permanent so as to yield an income; and such an agreement providing for the payment to plaintiff under certain contingencies of "ten per cent upon the investment," must be construed as an undertaking to pay annual interest at the rate named, and not merely an arbitrary augmentation of the sum received for the land. (*Id.*)

VENDOR AND VENDEE (Continued).

3. **FINDINGS—VALUE OF LAND.**—A finding that the value of the land did not at any time after the conveyance thereof exceed the sum of five hundred dollars was not vitally defective in failing to state that the value so found was the market value. The word "value," when applied to property and no qualification is expressed, means the price which the property would command in the open market, and therefore the word as used in the finding must be held to mean market value. (Id.)
4. **MEASURE OF DAMAGES.**—The measure of the plaintiff's damages is the difference between the sum found due under the agreement and the market value of the land. (Id.)
5. **VALUE OF LAND—OPINION OF WITNESS—WAIVER OF OBJECTION.**—Error, if any, in sustaining an objection to the opinion of a witness concerning the value of the land in such a case is cured where the witness was afterward permitted without objection to give his opinion of the value. (Id.)
6. **VALUE OF OTHER PROPERTY—WHEN INADMISSIBLE.**—The sale price of property other than that in question is not admissible in such a case where it is not shown to be similar in character and situation. (Id.)

See Broker; Ejectment; Specific Performance.

VENUE. See Place of Trial.

VERIFICATION. See Pleading, 3-4.

WARRANTY. See Sale, 14, 39, 40.

WATER AND WATER RIGHTS.

1. **IRRIGATION CORPORATION—CONSTRUCTION OF WASTE CANAL—LOCATION—IMPLIED CONSENT.**—Where a corporation organized for the purposes of securing water for irrigation and distributing the same among its stockholders is requested by the owner of a tract of land adjoining the territory watered by the irrigation system to construct a waste canal along the southerly line of such tract, for the purpose of preventing the flooding of the same from waste waters, and the corporation in complying with the request constructs the canal diagonally across such tract instead of in the place requested, and the owner makes objection thereto prior to completion of the construction, but thereafter notifies the corporation that she intends to make use of the canal for the purpose of irrigating her own land, such notification constitutes an implied consent to such construction, and the completion by the corporation likewise constitutes a consent to such user by the owner. (Imperial Water Co. No. 1 v. Wores, 253.)

WATER AND WATER RIGHTS (Continued).

2. **ACTION TO QUIET TITLE—INJUNCTION—COSTS.**—In an action by the corporation to quiet its title or right to the use of the waste canal across the land of such owner, and to enjoin the latter from maintaining any obstruction which will in any manner interfere with the free ingress or egress of the plaintiff for the purpose of cleaning, repairing, or inspecting such canal, and from obstructing in any way the flow of water therein, the plaintiff is entitled to its costs, notwithstanding the suit is in equity and includes the right to an injunction. (Id.)

WAY. See Right of Way.







